Supreme Court of the United States

OCTOBER TERM, 1965

No. 280

PASQUALE J. ACCARDI, ET AL., PETITIONERS

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A]

[File Endorsement Omitted]

* * * *

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 29022

Index No. 64 Civ. 238

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, and FRANK D. PRYOR, PLAINTIFFS-APPELLEES

against

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT

DEFENDANT-APPELLANT'S APPENDIX—filed September 10, 1964

STATEMENT UNDER RULE 15(b)

The above entitled action was commenced in the United States District Court for the Southern District of New York by the filing of the plaintiffs' complaint on January 23, 1964. The defendant, The Pennsylvania Railroad Company, was served on January 27, 1964. On March 13, 1964, attorneys for the respective parties entered into a stipulation of facts for the purpose of making cross-motions for summary judgment. The defendant moved for summary judgment by Notice of Motion dated March 18, 1964, and the plaintiffs cross-moved for summary judg-
[fol. 2] ment by Notice of Motion dated April 16, 1964. The motion was duly heard by Hon. Charles M. Metzner

on April 21, 1964. On April 29, 1964 Judge Metzner filed an opinion denying the defendant's motion for summary judgment and granting the plaintiffs' motion for summary judgment, with directions to settle order. Accordingly, the parties exchanged proposed judgments on May 12 and 15, 1964, respectively, and on June 1, 1964 (entered June 8, 1964) the Court below granted judgment in favor of each plaintiff in the amount of $1,403.10, representing the undisputed amount in suit together with interest thereon at 5% from November 1, 1961. The defendant filed its Notice of Appeal on June 10, 1964, and docketed the Record in this Court on June 26, 1964.

Since the stipulation between the parties sets forth all relevant facts, the Complaint and Answer are omitted from this Appendix. Jurisdiction of the Court below, which is predicated on section 9(d) of the Selective Training and Service Act of 1940, as amended, 50 U.S.C. App. § 459(d), is not challenged.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.—March 18, 1964

SIR:

PLEASE TAKE NOTICE that upon the annexed stipulation entered into March 13, 1964, and the annexed affidavit of A. E. Myles sworn to the 16th day of March, 1964, the defendant, The Pennsylvania Railroad Company, hereby moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the com- [fol. 3] plaint and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that the defendant will bring the above motion on for hearing in Room 506, The United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 21st day

of April, 1964, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard.

PLEASE TAKE FURTHER NOTICE that all opposing affidavits and answering memoranda shall be served not later than the 16th day of April, 1964, pursuant to Rule 9(c)(2) of the General Rules of the United States District [Court] for the Southern District of New York.

Dated: New York, N. Y., March 18, 1964.

Yours, etc.,

CONBOY, HEWITT, O'BRIEN & BOARDMAN
Attorneys for the Defendant

By EDWARD F. BUTLER
EDWARD F. BUTLER
A Member of the Firm

To:

ROBERT M. MORGENTHAU, Esq.
United States Attorney
Southern District of New York
Attorney for Plaintiffs.

JAMES G. GREILSHEIMER, Esq.
Special Assistant U. S. Attorney

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STIPULATION, DATED MARCH 13, 1964.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned, attorneys for the respective parties hereto, that the following facts may be deemed to be true for any purpose connected with this action, and for no other purpose whatsoever; but that the agreement of a party to the truth of any matter herein does not waive its objections as to the materiality or relevance of such matter to any issue involved in this action.

FIRST. The defendant, The Pennsylvania Railroad Company, is an interstate carrier by rail, existing under and by virtue of the laws of the Commonwealth of Pennsylvania, doing business within the State of New York and within the jurisdiction of this Court, and is subject to the Railway Labor Act, 45 U.S.C.A. §§ 151 *et seq.*

SECOND. Each of the plaintiffs herein is a former employee of the defendant who was employed by the defendant as a "fireman" or "oiler" on tug boats owned and operated by the defendant in the Port of New York as part of its rail service.

THIRD. The plaintiffs were first employed by the defendant in the capacity of fireman on defendant's tug boats in the Port of New York on the dates set forth below next to their names in column (a) hereof, from which dates their respective seniority as fireman has at all times been measured. The plaintiffs continued in their said employment until each of them left his position to enter the military service on the date indicated below next to his name in column (b). Each of them entered the armed forces on the date indicated in column (c) and served until the date indicated in column (d) when he was honorably discharged. Within 90 days after discharge each of the plaintiffs duly applied for reinstatement to his former position, or to a position of like status, seniority and pay;

[fol. 5] and on the date set forth below next to his name in column (e) hereof, each of the plaintiffs was duly reinstated to such position, his seniority being measured from the corresponding date in column (a).

Plaintiff	*First Employed (Seniority) (a)*	*Left for Military Service (b)*	*Entered Military Service (c)*	*Discharged from Military Service (d)*	*Restored to Defendant's Employment (e)*
Accardi	2/28/41	10/ 3/42	10/ 9/42	10/20/45	1/ 7/46
Grubesich	1/12/42	9/14/42	9/18/42	12/ 8/45	1/ 9/46
Seevers	10/20/41	4/19/42	4/23/42	11/10/45	11/29/45
Vassallo	9/ 3/42	11/10/42	11/16/42	12/ 8/45	1/14/46
Hoffman	7/ 2/42	1/11/43	1/12/43	1/ 9/46	2/11/46
Pryor	7/23/41	7/16/42	7/23/42	12/14/45	1/ 7/46

FOURTH. At the time that each of the plaintiffs was reemployed by the defendant, and prior to December 2, 1960, the defendant accorded to each of the plaintiffs all the rights to which he was entitled by the Selective Training and Service Act of 1940.

FIFTH. Prior to December 2, 1960, no collective bargaining agreement applicable to the plaintiffs contained any provision dealing with the abolition of a class of employee, or with discharge of employees other than for cause.

SIXTH. On June 10, 1959, the defendant and nine other rail carriers operating marine craft in the Port of New York abolished the craft and class of fireman, oiler or oiler/fireman on diesel tugs. The Transport Workers' Union (hereinafter referred to as TWU) and other affected unions called a strike. The carriers obtained an injunction forbidding the strike pending the exhaustion of the settlement procedures of the Railway Labor Act, and were themselves enjoined pending such exhaustion of remedies from discharging oilers or firemen.

[fol. 6] SEVENTH. On December 2, 1960, the defendant and six other rail carriers involved in said labor dispute entered into an Agreement of that date with the TWU, designed in good faith to settle the controversy arising out

of the carriers' abolition of the fireman or oiler classification. The said Agreement of December 2, 1960 (annexed hereto as Exhibit "A", and incorporated herein by reference), was "interpreted" by a Letter Agreement dated December 12, 1960 (annexed hereto as Exhibit "B", and incorporated herein by reference).

EIGHTH. Pursuant to the said Agreements, each of the plaintiffs herein was discharged on December 31, 1960, and his seniority was terminated as of that date. Each of the plaintiffs received a separation allowance, the amount of which was determined by the length of his compensated service with the defendant. The separation allowance was in addition to vacation pay. The number of years of compensated service, and the amount of the separation allowance actually received by each of the plaintiffs, is set forth below next to his name in columns (f) and (g) respectively. The parties agree that if a separation allowance based upon length of compensated service, which ignores time spent in the armed forces, is permissible under the Selective Training and Service Act of 1940, the amount credited to each such plaintiff is correct and the defendant should have judgment. But the plaintiffs do not admit that the separation allowance provided in this collective bargaining agreement, which ignores time spent in the armed forces, is lawful under the said act with respect to them, as veterans.

[fol. 7]

Plaintiff	*Length of Compensated Service (Years) (As of Dec. 1, 1960)* *(f)*	*Separation Allowance Paid* *(g)*
Accardi	17	$3,934.90
Grubesich	16	3,520.70
Seevers	16	3,520.70
Vassallo	15	3,106.50
Hoffman	15	3,106.50
Pryor	16	3,520.70

NINTH. The parties agree that had the plaintiffs not entered the armed forces, and had they continued to render compensated service to the defendant throughout their

respective periods of military service, the separation allowance to which each of them would have been entitled pursuant to the said Agreement would have been based upon the period set forth below next to his name in column (h); and each of the plaintiffs would have been entitled to a separation allowance in the amount set forth below opposite his name in column (i), and would be entitled to judgment against the defendant in the amount of $1,242.60.

Plaintiff	*Seniority as of December 31, 1960 (To Nearest Month) (h)*	*Separation Pay Based Upon Compensated Service and Military Service (i)*
Accardi	19 yrs. 9 mos.	$5,117.50 [*sic*; $5,177.50]
Grubesich	19 yrs. 0 mos.	4,763.30
Seevers	19 yrs. 2 mos.	4,763.30
Vassallo	18 yrs. 4 mos.	4,349.10
Hoffman	18 yrs. 6 mos.	4,349.10
Pryor	19 yrs. 5 mos.	4,763.30

TENTH. If the Court holds that the Selective Training and Service Act of 1940 required an agreement providing for a separation allowance based upon length of compen- [fol. 8] sated service to include time spent in the armed forces as a part of such period, the parties agree that each of the plaintiffs would be entitled to judgment against the defendant in the amount of $1,242.60. But the defendant denies that the Act requires it to include years spent in the armed forces in computing the separation allowance under said Agreement, or that the plaintiffs are entitled to any credit for such period.

ELEVENTH. Of the six plaintiffs, only the plaintiff Accardi was entitled to elect whether to remain in the defendant's employment by reason of his having had more than nineteen years six months seniority as of December 31, 1960, in accordance with the Agreement of December 2, 1960, as interpreted. Accardi did not elect to continue in the defendant's employment prior to December 23, 1960, as required by the said Agreement, nor did he attempt to do so at any subsequent time.

Dated: New York, N. Y., March 13, 1964.

ROBERT M. MORGENTHAU
United States Attorney
For the Southern District of New York

By JAMES G. GREILSHEIMER
Special Assistant Attorney
Attorney for the Plaintiffs

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By EDWARD F. BUTLER
EDWARD F. BUTLER
A Member of the Firm
Attorneys for the Defendant

[fol. 9]

EXHIBIT A, TO STIPULATION

AGREEMENT

This Agreement made this 2nd day of December, 1960

by and between

THE BALTIMORE AND OHIO RAILROAD COMPANY
THE BUSH TERMINAL RAILROAD COMPANY
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
THE LEHIGH VALLEY RAILROAD COMPANY
THE NEW YORK CENTRAL RAILROAD COMPANY
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY

REPRESENTED BY THE NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE

and

THE TRANSPORT WORKERS' UNION OF AMERICA, RAILROAD DIVISION LOCAL 1463, AFL-CIO

AS THE REPRESENTATIVE OF

THE EMPLOYEES OF SUCH CARRIERS IN MARINE SERVICE IN NEW YORK HARBOR, IN CLASSIFICATIONS KNOWN AS UNLICENSED ENGINEROOM PERSONNEL

[fol. 10] The positions variously designated as "fireman", "oiler" or "oiler/fireman" (all hereinafter referred to as Oiler) on Diesel-powered tug boats in New York Harbor, are abolished effective at the termination of each tour of duty December 31, 1960, subject to the terms and conditions hereinafter set forth.

1—A regularly assigned Oiler whose position is abolished shall receive a separation allowance based upon the following schedule:

Dated: New York, N. Y., March 13, 1964.

ROBERT M. MORGENTHAU
United States Attorney
For the Southern District of New York

By JAMES G. GREILSHEIMER
Special Assistant Attorney
Attorney for the Plaintiffs

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By EDWARD F. BUTLER
EDWARD F. BUTLER
A Member of the Firm
Attorneys for the Defendant

[fol. 9]

EXHIBIT A, TO STIPULATION

AGREEMENT

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by and between

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THE NEW YORK CENTRAL RAILROAD COMPANY
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
THE PENNSYLVANIA RAILROAD COMPANY

REPRESENTED BY THE NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE

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[fol. 10] The positions variously designated as "fireman", "oiler" or "oiler/fireman" (all hereinafter referred to as Oiler) on Diesel-powered tug boats in New York Harbor, are abolished effective at the termination of each tour of duty December 31, 1960, subject to the terms and conditions hereinafter set forth.

1—A regularly assigned Oiler whose position is abolished shall receive a separation allowance based upon the following schedule:

Length of Compensated Service	*Amount of Allowance Based Upon 40-Hour Week*
6 years	6 weeks
7 years	7 weeks
8 years	8 weeks
9 years	9 weeks
10 years	10 weeks
11 years	22 weeks
12 years	24 weeks
13 years	26 weeks
14 years	28 weeks
15 years	30 weeks
16 years	34 weeks
17 years	38 weeks
18 years	42 weeks
19 years	46 weeks
20 years	50 weeks

Note: A month of compensated service is any month in which the employee worked one or more days; a year of compensated service is 12 such months or major portion thereof. In computing length of compensated service, only service as an Engineer or Oiler with one carrier shall be counted.

An extra or furloughed Oiler of a carrier shall be eligible to receive said separation allowance provided he earned at least $2600 as an Oiler and/or Engineer in the employ [fol. 11] of said carrier during the period of June 15, 1958 to and including June 14, 1959.

2—An Oiler with 20 or more years of seniority as an Oiler as of December 1st, 1960, with one of the carriers signatory hereto may at his option elect to remain in the employment of the carrier in lieu of the separation allowance provided for subject to the following terms and conditions:

(a) An Oiler who elects to remain in the employment of the carrier in lieu of acceptance of said separation allowance shall continue his employment until death, dismissal for cause, resignation, retirement or attainment of age 65. It is understood that in no event will the number of positions available as a result of

the exercise of the option herein described exceed the number of Oilers who elect to remain in the employment of the carrier or the number of regularly assigned positions in existence on December 1, 1960, whichever is the lesser.

(b) A roster of oilers shall be established as of January 1, 1961, which shall include all employees holding seniority rights as Oilers with 20 years or more Oiler's seniority as of such date, and the terms of the Schedule Agreement shall apply to them.

(c) Vacancies arising for any reason whatsoever shall not be filled except to the extent that retained Oilers not working exercise their recall seniority rights under the Schedule Agreement.

(d) Such Oiler accepting the separation allowance herein provided for terminates his employment relationship and all seniority rights as an Oiler December 31, 1960.

[fol. 12] 3—Seniority rights and employment relationship of an Oiler with less than 20 years of seniority are terminated as an Oiler December 31, 1960.

4—An Oiler with 20 years or more of seniority with one of the carriers signatory hereto must notify his employing officer in writing on or before December 23, 1960, as to whether he elects to take the separation allowance provided for herein or elects to remain in the employment of the carrier; the exercise of such election is irrevocable. If an Oiler fails to so notify his employing officer, the carrier may then determine whether the Oiler is to be granted a separation allowance or to be retained in the employment of the carrier.

5—No Oiler shall be eligible for more than one allowance hereunder, nor shall the separation allowance payable to any Oiler under this agreement in any event exceed the sum of money said Oiler would have earned had he continued to work until attainment of age 65.

6—Oilers whose seniority rights and employment relationship are terminated in accordance with the terms of this agreement shall be entitled to vacation allowances in accordance with the applicable vacation rules or agreements, payable in January, 1961.

7—An Oiler holding seniority as an Engineer who remains in service under Section 2 of this agreement must, to the extent that there is a position of an Engineer available, exercise his seniority as an Engineer.

8—An Oiler with 20 or more years of seniority who is off duty on account of sickness or accident at the time this agreement becomes effective will be en-

[fol. 13] titled to the option provided for in Section 2 hereof provided he does so within 10 days after returning for duty.

9—The present operation of the New York Central Railroad Company makes the present application of this agreement to that carrier impracticable. It is agreed, however, that the principles adopted in this agreement will govern the dieselization of the New York Central Railroad Company. As dieselization proceeds, the parties will endeavor to accommodate the principles adopted herein to the successive steps of dieselization. The carrier shall not be required to provide any benefits more extensive or relatively more expensive than those provided herein. Neither shall the union be required to accept conditions less favorable to the affected employees. Should the parties fail to reach agreement, then, at the request of either party, the matter shall be submitted to arbitration in accordance with Paragraph 10 of this Agreement.

10—In the event that any dispute or controversy arises concerning the interpretation, application or enforcement of any of the provisions of this agreement, which are not settled by the authorized representatives of the parties hereto, it may be referred, by either party, to an Arbitration Board selected in the following manner: One (1) member to be selected by the representatives of the employ-

ees and one (1) member to be selected by representatives of the carriers. These two shall endeavor by agreement within ten (10) days after their appointment to select the third arbitrator. In case they are unable to reach agreement within ten (10) days, the National Mediation Board will be
[fol. 14] requested to appoint such third arbitrator in accordance with the provisions of the Railway Labor Act, as amended, who shall be the Chairman of the Board. The expenses, other than those of the neutral arbitrator, shall be paid by the party incurring them, including the compensation of the member of the Board of Arbitration selected by such party.

SIGNED AT NEW YORK, N. Y., THIS 12th DAY OF DECEMBER, 1960.

FOR THE CARRIERS:

NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE

/s/ J. J. Gaherin
Chairman

/s/ J. C. Hilly

/s/ W. A. Smith

/s/ F. Diegtel

/s/ P. J. Ellis

/s/ W. G. Chase

/s/ C. E. Alexander

FOR THE EMPLOYEES:

TRANSPORT WORKERS UNION OF AMERICA, RAILROAD DIVISION LOCAL 1463, AFL-CIO

/s/ Henry Hengartner
Executive Secretary, Railroad Division Local 1463, AFL-CIO

/s/ Thomas V. Flynn
International Representative, TWU

/s/ Eugene V. Attreed
Vice President, TWU and Director Railroad Division Local 1463, AFL-CIO

[fol. 15]

EXHIBIT B, TO STIPULATION

NEW YORK HARBOR CARRIERS' CONFERENCE COMMITTEE
ROOM 1050—342 MADISON AVE., NEW YORK 17, N. Y.

December 12, 1960

Mr. Henry Hengartner, Executive Secretary
Railroad Division Local No. 1463,
Transport Workers' Union of America, AFL-CIO

Dear Sir:

This will confirm the following understandings reached in conference on December 2, 1960, in connection with the Agreement of December 2, 1960, dealing with abolishment of Diesel Tug Boat Oilers' positions:

SECTION 1

In the application of the agreement entered into today, it is understood and agreed that an Oiler who was absent during the qualifying period referred to in Section 1 thereof because of an injury sustained in the course of his employment will be given credit for such lost time in computing qualifying period referred to above.

With respect to Oilers who were off duty due to illness during the aforesaid period, the parties will examine and consider such cases individually when and if they are presented by the representatives of the organization.

SECTION 2

An Oiler who has achieved more than 19 years and 6 months of seniority as an Oiler as of December 1, 1960, shall be deemed to have "20 or more years of seniority" as that term is used in Section 2 of the agreement.

[fol. 16]

SECTION 9

In reference to Paragraph 9 of Agreement between Transport Workers Union and the Carriers represented by the New York Harbor Carriers' Conference Committee, dated December 2, 1960—copy of which is attached hereto and made a part hereof:

It is understood and agreed that when the present Diesel tug boat is put into service by said carrier, the following terms will become effective:

(a)—If the Diesel tug boat is placed into service as a regular boat, the railroad will advertise only two shift positions of Oilers and need not fill the third shift positions nor provide rest day relief for the first two positions nor fill vacancies of the first two positions of Oilers.

(b)—If the Diesel tug boat is placed into service as an extra boat, Oilers will be assigned as follows:

Three shifts in a 24-hour period—one (1) Oiler on each of two shifts.
Two shifts in a 24-hour period—one (1) Oiler on one shift.
One shift in a 24-hour period—no Oiler.

In consideration of the above, the carrier agrees that its representative will meet with the organization's representatives to review the present roster in relation to the number of extra men carried thereon, and endeavor to reach an understanding as to the regulation of such roster in a manner that will not adversely affect the operation of the carrier and will achieve as practicable as possible an equal distribution of the work performed by the extra men.

Yours very truly,

/s/ J. J. Gaherin
Chairman, New York Harbor Carriers' Conference Committee

ACCEPTED:

/s/ Thomas V. Flynn

[fol. 17]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF A. E. MYLES, IN SUPPORT OF DEFENDANT'S MOTION

COMMONWEALTH OF PENNSYLVANIA)
) ss.:
COUNTY OF PHILADELPHIA)

A. E. MYLES, being duly sworn deposes and says:

1. I am the Manager of Labor Relations of the defendant, The Pennsylvania Railroad Company, and as such am the chief operating officer of the defendant designated to handle labor disputes arising under the Railway Labor Act, within the meaning of Section 3 First (i) thereof, 45 U.S.C.A. Section 153 First (i), and make this affidavit in support of the defendant's motion for summary judgment herein.

2. I was appointed Manager of Labor Relations (system wide) on October 1, 1963. Prior to said date, and since November 1, 1958, I was Assistant Manager of Labor Relations (system wide). I have been intimately connected with the labor relations of the defendant, The Pennsylvania Railroad Company, since October 15, 1948, when I became Supervisor of Personnel—Labor and Wage Bureau, Western Region, Chicago, Illinois. Thereafter, on November 1, 1955, I became Superintendent of Personnel—Buckeye Region, Cincinnati, Ohio, at which post I remained until I was appointed Assistant Manager of Labor Relations (system wide) on November 1, 1958.

3. The Agreement of December 2, 1960, between the defendant and the Transport Workers' Union of America, was the first agreement, applicable to the class of employee of which these plaintiffs were members, or to any other class of employee of the defendant, which provided for the payment of a separation allowance upon the termination of employment. Prior to that date, no such provision was contained in any agreement to which the de-

fendant was a party applicable to the plaintiffs of any other employees of the defendant.

[fol. 18] 4. The Agreement of December 2, 1960, applicable to the plaintiffs in this action, was a good faith settlement of a pending labor dispute between the defendant and other carriers on the one hand, and the Transport Workers' Union on the other, and was at no time intended by any party thereto to discriminate against either veterans or non-veterans.

5. The foregoing affidavit is made upon my personal knowledge and familiarity with the labor policies and practices of the defendant, and of the negotiations leading to the signing of the Agreement of December 2, 1960, as well as upon review of records of the defendant maintained under my supervision.

[Sworn to by A. E. Myles on March 16, 1964.]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT.—April 16, 1964

PLEASE TAKE NOTICE that upon the annexed stipulation entered into on March 13, 1964, the plaintiffs hereby cross-move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment, and for such other and further relief as may seem just and proper to the Court.

PLEASE TAKE FURTHER NOTICE that the plaintiffs will bring the above motion on for hearing in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 21st day of April, 1964, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard.

Dated: New York, New York, April 16, 1964.

Yours, etc.,

ROBERT M. MORGENTHAU,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiffs,

By JAMES G. GREILSHEIMER,
Assistant United States Attorney.

To:

CONBOY, HEWITT, O'BRIEN & BOARDMAN, Esqs.,
Attorneys for Defendant.

[fol. 19]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION, DATED APRIL 28, 1964, GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.*

APPEARANCES:

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York, Attorney for Plaintiffs; JAMES G. GREILSHEIMER, Assistant United States Attorney, of Counsel.

CONBOY, HEWITT, O'BRIEN & BOARDMAN, of New York, N. Y., Attorneys for Defendant; R. L. Duff, of Counsel.

METZNER, D. J.:

The action seeks relief under the re-employment rights given to veterans § 9 of the Universal Military Training and Service Act, 50 U.S.C. App. § 459. The parties cross-move for summary judgment. There is no dispute as to the facts.

The plaintiffs are former employees of the defendant, the Pennsylvania Railroad. All had left their employment to enter military service. Upon being honorably discharged from service, they were reinstated in their employment with the same seniority, status and pay as had been achieved by those employees who did not enter military service. In December 1960 the Transport Workers Union and defendant entered into an agreement to settle an existing strike. The agreement provided for the abolition of certain positions and payment of separation allowances to the discharged employees based upon their years of compensated service. In computing the amount of separation allowances for these six plaintiffs, they did not receive credit for the years spent in the armed forces. The action seeks recovery of the amounts payable to these plaintiffs with that credit.

The determination of this issue depends upon the construction to be given to section 459. The section provides

* Reported at 229 F. Supp. 193.

[fol. 20] in subdivision (b)(B) that a person honorably discharged from military service shall be re-employed and restored by his employer "to such position or to a position of like seniority, status, and pay". Subdivision (c)(1) provides that any person who is restored to a position in accordance with subdivision (b)(B)

> "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence. . . ."

The key to the construction of the section is found in subdivision (c)(2) which reads:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

It was the intent of Congress that the returning veteran

> "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284 (1946).

The escalator principle has been reaffirmed in *Tilton* v. *Missouri Pacific R. R.*, 376 U. S. 169 (1964); *Oakley* v. [fol. 21] *Louisville & Nashville R. R.*, 338 U. S. 278 (1949); *Trailmobile Co.* v. *Whirls*, 331 U. S. 40 (1947).

In *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (2d Cir. 1957), the court was concerned with the right of returned veterans to increases in salary granted by a collective bargaining agreement which by its terms was applicable only

to employees with a specified number of hours of "consecutive working service" immediately preceding the date on which the increase was granted. The agreement defined the consecutive working service as actual service of 1800 hours per year as a minimum calculated on the basis of the employee's straight time hourly earnings. The contract provided that persons on furlough or leave of absence did not accrue consecutive working service. The question before the court was whether the plaintiffs should be regarded as having been on leave of absence, so that they did not meet the standard of "consecutive working service", or whether they should be given equal status with nonveterans who remained continuously on the job.

The court discussed the very problem presented in this case, which is the interpretation of subdivision (b)(B) and (c)(1). How do you differentiate between "seniority," "status," and "pay" on one hand and "other benefits" on the other? The court was faced with its prior decisions holding that vacation pay benefits awarded to fellow employees while the plaintiff was in military service were not available to the latter. *Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (2d Cir. 1956); *Siaskiewicz* v. *General Elec. Co.*, 166 F. 2d 463 (2d Cir. 1948); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2d Cir. 1948). The rationale of those decisions was that vacation pay did not go to seniority under (b)(B), but to "other benefits" under (c)(1) and therefore practices as to employees on furlough or leave of absence controlled.

[fol. 22] The court said,

> "While the problem of construction is difficult, it seems most likely that the expression 'insurance or other benefits' was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of 'pay,' 'status,' or 'seniority.'" 246 F. 2d at 738.

While vacation pay was held to be of this fringe character, the provision for increase in pay based on actual service of hours per year was held not to be a fringe benefit.

The court allowed the inclusion in "actual service of 1800 hours per year" of the time spent in military service.

In *Seattle Star* v. *Randolph*, 168 F. 2d 274 (9th Cir. 1948), the court was presented with a question of severance pay and found that such pay was a fringe benefit, relying on *Dwyer* v. *Crosby Co., supra*, a vacation pay case. In the *Seattle Star* case the agreement provided that the time spent on leave should not count as service time. The court read this provision in conjunction with subdivision (c)(1), which refers to employees in the armed services as being on leave of absence. The existence of such a provision in the *Borges* case was not even considered by the court in reaching its determination.

In *Hire* v. *E. I. du Pont de Nemours & Co.*, 324 F. 2d 546 (6th Cir. 1963), the court held that a returning veteran who stepped off the escalator to find that fellow employees of like seniority and status had been laid off, given severance pay and placed upon a recall list, was himself entitled to that severance pay.

The question of severance pay does not appear to have arisen in this circuit. However, I am of the opinion that the approach by the court in the *Borges* case and the general purposes underlying the Act call for a ruling here [fol. 23] that subdivision (b)(B) is applicable and that in computing severance pay plaintiffs are entitled to include the time spent in the armed forces.

A reading of the congressional history (86 Cong. Rec. 10914 (Aug. 26, 1940)) indicates that the final form of subdivision (c)(1), with its reference to "leave of absence", was not adopted with any intention to curtail the rights of the veteran. It is obvious that there can be many practical situations where (c)(1) literally applied can negative the "escalator" purpose of the Act.

Defendant argues that since the agreement between itself and the union was entered into more than one year after plaintiffs were restored to their employment, the Act has no application to any rights created by the agreement. Section 9(c) of the Act provides that a veteran who is restored to employment pursuant to section 9(b) "shall not be discharged . . . without cause within one year after such restoration." This right is separate and distinct from the right to be restored to employment in a

position "of like seniority, status, and pay". If the time limitation against discharge without cause were to be read as a limitation on the other benefits created by the Act, it would nullfy [*sic*] its whole purpose, because then the employer and a union could redraw an agreement with impunity after one year from the employee's return from service.

The case of *Trailmobile Co.* v. *Whirls, supra,* relied on by defendant, is not to the contrary. There the issue was whether the preferred benefits given by the Act should inure to the veteran after the one-year period had run, so that he would not only be placed on a par with his non-veteran fellow workers, but would be given additional advantages. In that case the action of the employer was sustained because the same harsh treatment was applied without discrimination between veterans and nonveterans of like seniority.

[fol. 24] Defendant's motion for summary judgment is denied. Plaintiffs' cross-motion for summary judgment is granted. Settle order.

Dated: New York, N. Y.
April 28, 1964

CHARLES M. METZNER
U. S. D. J.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUDGMENT ENTERED JUNE 8, 1964

Upon the decision of this Court filed on April 29, 1964 in the within suit, whereby defendant's Motion for Summary Judgment was denied and plaintiff's Cross-Motion for Summary Judgment was granted and upon all of the prior proceedings, it is hereby

ORDERED AND ADJUDGED that each of the plaintiffs shall recover judgment against the named defendant, The Pennsylvania Railroad Company, for the sum of $1,242.60, together with interest at the rate of 5% per an-

num from November 1, 1961 through May 22, 1964 in the sum of $160.50 for a total of $1,403.10.

Dated: New York, New York, June 1, 1964

CHARLES M. METZNER
U. S. D. J.
Rec'd in Clerk's Office 6/8/64

JUDGMENT ENTERED 6/8/64
JAMES E. VALECHE
Clerk

[fol. 25]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL.—June 9, 1964

SIR:

PLEASE TAKE NOTICE, that the defendant, The Pennsylvania Railroad Company, hereby appeals to the United States Court of Appeals for the Second Circuit from an order and judgment herein, per Hon. Charles M. Metzner, U.S.D.J., granting judgment for each of the plaintiffs herein, entered in this action on the 8th day of June, 1964.

Dated: New York, New York, June 9, 1964.

Yours, etc.,

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Attorneys for the Defendant.

By /s/ David J. Mountan, Jr.,
A Member of the Firm.

To:

HON. ROBERT M. MORGENTHAU,
Attorneys for the Plaintiffs,
United States Attorney for the
Southern District of New York,
James G. Greilsheimer,
Special Assistant Attorney.

[fol. 26]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 153—September Term, 1964.

Argued November 12, 1964

* * * *

Docket No. 29022

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, and FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY,
DEFENDANT-APPELLANT

Before:

LUMBARD, *Chief Judge*,
SWAN and WATERMAN, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Southern District of New York, Metzner, *J.*, 229 F. Supp. 193, granting claims by veterans against their former employer for sums allegedly due them under 50 U. S. C. App. § 308 (1946). Reversed.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (James G. Greilsheimer, Asst. United States Attorney, of counsel), *for Plaintiffs-Appellees.*

[fol. 27]

CONBOY, HEWITT, O'BRIEN & BOARDMAN (R. L. Duff, of counsel), New York City, *for Defendant-Appellant.*

OPINION—January 25, 1965

WATERMAN, *Circuit Judge*:

Plaintiffs, veterans of World War II, brought suit in the United States District Court for the Southern District of New York. They claimed that defendant, their former employer, had denied them that portion of a separation allowance, granted in 1960, to which they were entitled under Section 8 of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 308 (1946). Upon cross motions for summary judgment, Judge Metzner awarded the sums claimed by plaintiffs. His opinion is reported at 229 F. Supp. 193.

Defendant has appealed, arguing that the provisions of Section 8 relied on by plaintiffs does not apply either to separation allowances or to benefits granted more than one year after an employee's return to work from military service. We reverse the district court on the applicability of Section 8 to separation allowances, and therefore we do not reach defendant's alternative ground for reversal. Nor need we discuss defendant's additional contention on appeal that the district court improperly computed the interest owing on the judgment awarded to plaintiffs.

The relevant facts in this case are stipulated. Plaintiffs first entered the employ of defendant in 1941 and 1942 as firemen on tugboats in New York harbor. They left their jobs during World War II to serve in the armed forces, but at the close of the war they were reinstated in their former positions. Thereafter, they worked continuously as tugboat firemen for defendant until 1960. In December of that year, defendant and the union which represented plaintiffs reached an agreement designed to settle a bitter dispute over reduction of work forces in connec- [fol. 28] tion with the transition from steam-powered to diesel-driven tugs. The contract abolished the job of fire-

man on the diesel tugs but awarded the displaced employees separation allowances that varied in amount according to each employee's "length of compensated service." Plaintiffs were permanently separated from defendant's employ pursuant to the contract, and, in computing their separation allowances, defendant credited them only with time actually spent in its employ for which they received wages.

This suit arises out of plaintiffs' claim that defendant should have included their years in the armed forces in calculating the separation allowances. Plaintiffs do not content that the phrase "compensated service" was intended by defendant and the union to encompass military service. Rather, they argue that Section 8 of the Act requires that they be credited with their years in the armed forces, regardless of the intent of the parties to the agreement. Plaintiffs are correct in assuming that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285 (1946). The problem presented by this case is that of whether the statute dictates that military service should have been included in "compensated service," irrespective of the intent of union and employer in choosing that language.

Section 8(b)(B) of the Act requires that a private employer restore a returning veteran "to [his former] position or to a position of like seniority, status, and pay . . ." Section 8(c) further provides:

> Any person who is restored to a position in accordance with the provisions of paragraph . . . (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of [fol. 29] training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the

> time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

If the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of "seniority, status, and pay," plaintiffs are entitled to be treated as if they had kept their positions continuously during World War II. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, at 284-85. On the other hand, if the allowances constituted "insurance or other benefits," plaintiffs are not entitled to be credited with their years in the armed forces, for, with certain immaterial exceptions, the agreement between defendant and the union did not treat time spent by employees "on furlough or leave of absence" as "compensated service."

There are no decisions in this circuit or in the Supreme Court determining whether separation allowances are included within the categories of "seniority, status, and pay" or of "insurance or other benefits." However, in *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 738 (2 Cir. 1957), we drew the line between the two categories as follows:

> While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority."

[fol. 30] In *Borges*, we ruled that "wage increases were in no sense fringe benefits, but became a regular part of the jobholder's pay or status, swelling his pay check every week he worked in the future . . ." *Id.* at 738-39. On the other hand, in *Siaskiewicz* v. *General Elec. Co.*, 166 F. 2d 463, 465-66 (2 Cir. 1948), we decided that "since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of 'other benefits'." Accord, *Alvado* v. *General Motors Corp.*, 229 F. 2d 408, 410-11 (2 Cir. 1956), *cert. denied*, 351 U. S. 983; *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2 Cir. 1948).

With some doubts, we hold that the separation allowances in the present case are properly "other benefits" rather than includable within "seniority, status, and pay." Unlike the wage increases in *Borges*, they did not become a regular part of plaintiffs' earnings, and, like the vacation rights in *Siaskiewicz*, they were neither pay for work actually done nor a traditional perquisite of seniority. On the contrary, they seemingly constituted only a miscellaneous benefit, devised *ad hoc* after intensive collective bargaining in order to serve a transitory purpose. We are confirmed in this conclusion by the decisions of two other Courts of Appeals. *Hire* v. *E. I. du Pont de Nemours & Co.*, 324 F. 2d 546, 549-50 (6 Cir. 1963); *Seattle Star, Inc.* v. *Randolph*, 168 F. 2d 274 (9 Cir. 1948). There are no appellate decisions to the contrary.

Reversed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. THOMAS W. SWAN,
HON. STERRY R. WATERMAN,
Circuit Judges.

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY,
DEFENDANT-APPELLANT

JUDGMENT—January 25, 1965

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

* * * *

[fol. 32]

[File Endorsement Omitted]

[fol. 33]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1964

[Title Omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 27, 1965

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including June 21, 1965.

/s/ John M. Harlan
Associate Justice of the
Supreme Court of the United States

Dated this 27th day of April, 1965

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. 280, October Term, 1965

PASQUALE J. ACCARDI, ET AL., PETITIONERS

v.

THE PENNSYLVANIA RAILROAD COMPANY

ORDER ALLOWING CERTIORARI.—October 11, 1965.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 791033 288

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

PASQUALE J. ACCARDI, ET AL., PETITIONERS

v.

THE PENNSYLVANIA RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Varsallo, Abraham S. Hoffman, and Frank D. Pryor,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on January 25, 1965.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 229 F. Supp. 193. The opinion of the court of appeals (App., *infra*, p. 17) is reported at 341 F. 2d 72.

[1] The Department of Justice represents these veterans pursuant to Section 8(e) of the Selective Training and Service Act of 1940, 54 Stat. 885, 891, 50 U.S.C. App. (1946 ed.) 308(e).

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 22) was entered on January 25, 1965. By order of Mr. Justice Harlan the time for filing a petition for a writ of certiorari was extended to and including June 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Employees whose jobs with the respondent railroad were abolished in 1960 were paid separation allowances based upon the number of months in which they had worked at least one day for the respondent. The question presented is whether, by virtue of Section 8 of the Selective Training & Service Act of 1940 (now Section 9 of the Universal Military Training & Service Act of 1951, 50 U.S.C. App. 459), the separation allowances paid to employees whose employment was interrupted by military service should be computed as if they had been continuously employed by respondent during their absence in the Armed Forces.

STATUTE INVOLVED

1. The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) 308, are as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the

completion of such period of training and service * * *. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

2. The provisions of Section 9(c)(1) of the Selective Service Act of 1948, 62 Stat. 615 (renamed the "Universal Military Training and Service Act" by the Act of June 19, 1951, 65 Stat. 75), 50 U.S.C. App. 459, are identical with those of Section 8(c) of the Selective Training and Service Act, but Section 9(c)(2) of the 1948 Act further provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

1. *Background.* This case involves the application of the re-employment provisions of the Selective Training and Service Act of 1940 (now the Universal Military Training and Service Act, 50 U.S.C. App. 459) to veterans, who, after resuming their civilian employment, were discharged when technological advances caused the elimination of their jobs. The facts are not in dispute.

Petitioners entered the employ of the respondent railroad in 1941 and 1942, when they signed on as "oilers" or "firemen" on the steam-operated tugboats then maintained by the railroad in New York Harbor. Each petitioner's civilian employment with the railroad was interrupted by military service during

the Second World War. After approximately three years of wartime service, petitioners were honorably discharged from the Armed Forces and were restored to their former positions with the railroad.

Following petitioners' re-employment, the railroad replaced almost all of its steam tugboats with diesel vessels. While the former required the services of two men in the engine room (an engineer and a fireman), in the railroad's view the diesel vessels needed only an engineer. In 1959, the railroad's decision to abolish the position of "fireman-oiler" on their diesel tugs led to a serious strike,[2] which was settled by a collective bargaining agreement dated December 2, 1960, between various railroad companies (including respondent) and the unions representing unlicensed engine-room personnel (including petitioners).

No prior collective bargaining agreement covering these employees contained provisions dealing with the abolition of an entire class of employee. The agreement in question makes no reference to, and contains no provisions expressly dealing with, the rights of veterans entitled to the benefit of the re-employment provisions of the Act.

2. *The controversy.* As of December 31, 1960, each petitioner lacked, by a matter of months, twenty years' seniority with the railroad. Under the terms of the December 2 agreement, such employees were dismissed with a monetary separation allowance based upon the

[2] The background of this dispute is detailed in *Baltimore & Ohio R. Co., etc.* v. *United Railroad Wkrs.*, 176 F. Supp. 53 (S.D.N.Y.), affirmed in part and reversed in part, 271 F. 2d 87 (C.A. 2), vacated and remanded, 364 U.S. 278.

number of months in which the employee had worked at least one day for the railroad. In computing those allowances, however, the railroad did not credit the months petitioners spent in military service—on the ground that during that period petitioners did not "work one or more days" each month for the railroad. It is stipulated that, as a result, each petitioner was paid $1,242.60 less than the amount to which he would have been entitled "had [he] continued to render compensated service to the [respondent] throughout their respective periods of military service * * *."

Petitioners contended that the Selective Training and Service Act of 1940 gave them the right to be treated as having been continuously employed during their time in military service for purposes of computing their separation allowances. When the railroad declined to adjust their allowances accordingly, they instituted this action in the district court.

3. *The proceedings below.* Both sides moved for summary judgment. On April 28, 1964, the district court rendered a decision in favor of the petitioners, 229 F. Supp. 193. The court ruled, in substance, that (1) Section 8(b)(B) of the Act required veterans to be restored to positions in their former civilian employment of "seniority, status, and pay" comparable to those which they would have achieved had they been continuously employed; (2) a "separation allowance" falls within the concept of "seniority, status, and pay"; and (3) had petitioners been continuously employed in their civilian jobs they would have been entitled to separation allowances in the amounts they claimed.

"With some doubts," the court of appeals reversed. It recognized that "[i]f the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of 'seniority, status, and pay,' plaintiffs are entitled to be treated as if they had kept their positions continuously during World War II." But the court concluded that these allowances fall rather within the class of "insurance or other benefits," covered by Section 8(c) of the 1940 Act. That section, now Section 9(c)(1) of the Universal Military Training and Service Act of 1951, provides that a veteran restored to his former position:

> * * * shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *.

Since time spent on furlough or leave of absence was not counted in determining an employee's separation allowance, the Second Circuit reasoned that military-service time was also excludable.

REASONS FOR GRANTING THE WRIT

Under the relevant collective bargaining agreement, petitioners are entitled to increased separation allowances if, as they contend, the federal statute requires that veterans be treated for that purpose as if they were continuously employed during the period of their military service. Petitioners are admittedly entitled to nothing more if they are to be treated as having been on "leave of absence" or "furlough." The issue

777-704—65——2

is one of substantial importance in the operation of the protective provisions of the Universal Military Training and Service Act of 1951. The ruling below, we believe, is inconsistent with this Court's decisions, and there is a direct conflict among the circuits.

The court of appeals recognized that, under this Court's decisions, returning veterans are entitled to have their time in the service treated as continuous employment—rather than as time on leave of absence or furlough—for purposes of determining seniority and the benefits of "status" and "pay" which flow from seniority. Here, there is no question that petitioners' co-employees have received full credit, for purposes of separation allowances, for any month in which they worked at their civilian jobs for as little as one day. Nonetheless, the court below has concluded that petitioners may not receive comparable benefits based upon the period that their employment by the railroad was precluded by military service. It has reached this result by drawing a distinction between basic benefits (as to which the veteran is to be treated as if he were continuously employed) and "fringe" benefits (as to which he is to be treated as if he were on leave of absence).

We submit that no such distinction was contemplated by the federal statutes—that a veteran's time in military service must be considered for seniority purposes regardless of the nature of the benefit flowing from seniority. The ruling below is of substantial importance not only because technological advances have occasioned a serious and immediate problem as to the proper determination of separation

allowances but also because it will deprive veterans of other "fringe" benefits keyed to seniority.

1. The Second Circuit correctly acknowledged that "if the separation allowances granted to [petitioners] in 1960 come within the statutory concepts of 'seniority, status, and pay,' [petitioners] are entitled to be treated as if they had kept their positions continously during World War II." 341 F. 2d at 74. Only two terms ago, this Court held in *Tilton* v. *Missouri Pacific R. Co.,* 376 U.S. 169, and *Brooks* v. *Missouri Pacific R. Co.,* 376 U.S. 182, that for purposes of determining seniority status and the benefits which flow from it, veterans are to be treated as if they were continuously employed during the period of their absence. In so holding, the Court reaffirmed its prior decision in *Diehl* v. *Lehigh Valley R. Co.,* 348 U.S. 960, where it had reversed a Third Circuit decision holding that the veterans' seniority rights were limited to those which would be enjoyed by a non-veteran who had been on furlough or leave of absence during the time the veteran was in military service. "The principle underlying this legislation is that he who is 'called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job.'" *Tilton* v. *Missouri Pacific R. Co.,* 376 U.S. at 170-171, quoting from *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 328 U.S. 275, 284.

Thus, as the court below noted, if petitioners' position on the seniority roster, or right to an advanced position or rate of pay, depended upon the number of months in which they had worked one day, they would be entitled to be treated as if each had been continu-

ously employed during his period of military service. Where such benefits are dependent solely upon the time an employee is present on the job (and not upon the increased proficiency which comes from experience and training on the job), the veteran is to be accorded the benefits enjoyed by one continuously employed. This is the holding of *Tilton, Brooks,* and *Diehl, supra,* as to position on the seniority roster; of *McKinney* v. *Missouri-Kansas-Texas R. Co.,* 357 U.S. 265, as to the right to advanced position; and of *Moe* v. *Eastern Air Lines,* 246 F. 2d 215 (C.A. 5), and *Borges* v. *Art Steel Co.,* 246 F. 2d 735 (C.A. 2), as to rate of pay.

We know of no basis for distinguishing among the various advantages that may flow from seniority alone, whether they relate to pay, position, vacation rights, job security or separation allowances. To be sure, if the veteran's right to any of these advantages is dependent upon something more than seniority—*i.e.*, if the claimed benefits are the consideration for work a veteran has not performed, or for experience he has not acquired—the veteran cannot claim them. But where the veteran's right to any of these benefits depends solely upon length of service, the veteran is entitled to be treated as if he had been continuously employed during the military service.[3] In particular,

[3] This distinction is at the heart of several decisions of the Second Circuit denying veterans particular vacation benefits, although that Circuit has at times talked as if vacation rights were wholly outside the statutorily protected benefits of "seniority, status, and pay." *Siaskiewicz* v. *General Electric Co.,* 166 F. 2d 463 (C.A. 2); *Dwyer* v. *Crosby Co.,* 167 F. 2d 567 (C.A. 2); *Alvado* v. *General Motors Corporation,* 229 F. 2d 408 (C.A.

no meaningful distinction can be drawn between the right to be paid separation allowances in the present case and the right to wage-rate increases, similarly based upon seniority, which were involved in *Moe* and *Borges*. Both were strictly conditioned on length of service; neither constituted payment for work actually done or for experience gained.

2. The court below apparently believed that a different conclusion was dictated by the language of Section 8(c) of the 1940 Act (now Section 9(c)(1) of the 1951 Act, 50 U.S.C. App. 459(c)(1)), which provides:

> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of senority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

The court viewed the statutory scheme as creating a dichotomy between "insurance or other benefits" (as

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2), certiorari denied, 351 U.S. 983. Where length of vacations is strictly dependent on years of service, *i.e.*, seniority, the Act plainly permits a re-employed veteran to include his service time in determining vacation rights. *Mentzel* v. *Diamond*, 167 F. 2d 299 (C.A. 3).

to which the returned veteran was to be treated only as if he had been "on furlough or leave of absence") and the concept of "seniority, status, and pay" (as to which the veteran was entitled to enjoy all the benefits of one who had been continuously employed). The Second Circuit concluded "[w]ith some doubts * * * that the separation allowances in the present case are properly 'other benefits' rather than includible within 'seniority, status, and pay,'" because they were neither "pay for work actually done," nor "a regular part of plaintiff's earnings," nor "a traditional perquisite of seniority." App., *infra*, p. 21. The Sixth Circuit has reached a directly contrary conclusion, treating severance allowances as "pay" for purposes of 50 U.S.C. App. 459, the present re-enactment of the statute here in issue. *Hire* v. *E. I. DuPont de Nemours & Co.*, 324 F. 2d 546, 550.

In our view, the legislative history shows that Congress never intended any such division between ordinary and extraordinary, or between basic and incidental, benefits of seniority. The "insurance or other benefits" language of Section 8(c) serves a discrete function. It was added to make certain that veterans would enjoy, *during their absence in military service,* all those benefits accorded to other employees on leave of absence. It was not intended to limit a veteran's rights upon his return to civilian employment.

The original form of Section 8(c) provided only for the veteran's rights on his return from military service. It stated (86 Cong. Rec. 10790):

> Any person who is restored to a position in accordance with paragraphs (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged without cause within one year after such restoration.

This language was amended, without substantial debate, for the apparent purpose of adding a guarantee that any benefits accruing to employees absent on other forms of leave should also be enjoyed by the veteran while he was absent in military service. In the words of the amendment, the veteran was to "be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into [the military] forces."

Senator Sheppard, Chairman of the Senate Committee which reported the bill, explained (86 Cong. Rec. 10914):

> That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me to be a good suggestion.

Congressman May, Chairman of the House Committee on Military Affairs, introduced the same amendment in the House, where he explained (86 Cong. Rec. 11702):

> Mr. MILLER. In reference to insurance, will that apply to group insurance? Many in-

> dustrial plants, of course, carry group insurance. Under those contracts they continue their participation while a man is on vacation or furlough. Would they continue those policies in force?
>
> Mr. MAY. This would continue them in force and that is the very purpose of the legislation.

In short, the veteran was to be treated as "on furlough or leave of absence" only for the purpose of assuring him the enjoyment of certain benefits accruing *during his absence—i.e.,* the benefits offered by the employer to other employees on furlough or leave of absence pursuant to provisions in effect at the time the veteran was inducted. It is hardly necessary to add that this Court has long since made it clear that Section 8(c)'s direction that a veteran "be considered as having been on furlough or leave of absence" does not limit the veteran's seniority rights, on his return from service, to those which would be enjoyed by a furloughed employee. *Diehl* v. *Lehigh Valley R. Co.,* 348 U.S. 960, reversing 211 F. 2d 95 (C.A. 3); *Tilton* v. *Missouri Pacific R. Co., supra; Brooks* v. *Missouri Pacific R. Co., supra.*[4]

3. Technological displacement of employees has become a major problem of the economy. The decision below will adversely affect a substantial number of veterans in industries where the steady advances of automation are lowering manpower requirements.

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[4] We recognize that, with regard to separation allowances, the Ninth Circuit reached a contrary conclusion seventeen years ago in *Seattle Star* v. *Randolph,* 168 F. 2d 274. But that decision preceded, and its rationale in no way reflects, the controlling decisions of this Court which have been handed down in the intervening years.

The present case bears significantly upon the scope of the separation rights granted by federal statutes to the extremely large number of employees who have served in the military service since 1940, as well as to the many men still being called into the military service.

Indeed, this decision already has affected the administration of the award made in the recent arbitration of the nationwide dispute relating to the size of railroad crews. Under the terms of that award, many "firemen's" positions are abolished and a significant number of persons will be discharged. The railroads initially acquiesced in the view that the statute (as applied to the award) required the military service of veterans to be treated as "continuous employment" for purposes of computing their separation allowances. Since the decision below was handed down, at least five major railroads have refused to continue making settlements on this basis.

Moreover, the decision below has implications which go beyond the matter of separation allowances. As already observed, the court of appeals has created an exception to the statutory protections recognized in this Court's decisions. Its holding is that a veteran need only be treated as "continuously employed" for the purposes of determining the "basic" rights of "seniority," "status," and "pay"; he need not be so treated for the purpose of determining his right to "fringe" benefits under collective bargaining agreements. Thus, the decision will also inevitably affect veterans' claims to other benefits which are common subjects under labor agreements and are normally

contingent on length of employment, *e.g.*, layoff benefits, pensions, vacation privileges, and the like.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOHN W. DOUGLAS,
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ALAN S. ROSENTHAL,
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JUNE 1965.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 153—September Term, 1964

(Argued November 12, 1964 Decided January 25, 1965)

Docket No. 29022

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, AND FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT

Before: LUMBARD, Chief Judge, SWAN and WATERMAN, Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Metzner, *J.*, 229 F. Supp. 193, granting claims by veterans against their former employer for sums allegedly due them under 50 U.S.C. App. § 308 (1946). Reversed.

WATERMAN, *Circuit Judge:*

Plaintiffs, veterans of World War II, brought suit in the United States District Court for the Southern District of New York. They claimed that defendant,

their former employer, had denied them that portion of a separation allowance, granted in 1960, to which they were entitled under Section 8 of the Selective Training and Service Act of 1940, 50 U.S.C. App. § 308 (1946). Upon cross motions for summary judgment, Judge Metzner awarded the sums claimed by plaintiffs. His opinion is reported at 229 F. Supp. 193.

Defendant has appealed, arguing that the provision of Section 8 relied on by plaintiffs does not apply either to separation allowances or to benefits granted more than one year after an employee's return to work from military service. We reverse the district court on the applicability of Section 8 to separation allowances, and therefore we do not reach defendant's alternative ground for reversal. Nor need we discuss defendant's additional contention on appeal that the district court improperly computed the interest owing on the judgment awarded to plaintiffs.

The relevant facts in this case are stipulated. Plaintiffs first entered the employ of defendant in 1941 and 1942 as firemen on tugboats in New York harbor. They left their jobs during World War II to serve in the armed forces, but at the close of the war they were reinstated in their former positions. Thereafter, they worked continuously as tugboat firemen for defendant until 1960. In December of that year, defendant and the union which represented plaintiffs reached an agreement designed to settle a bitter dispute over reduction of work forces in con-

nection with the transition from steam-powered to diesel-driven tugs. The contract abolished the job of fireman on the diesel tugs but awarded the displaced employees separation allowances that varied in amount according to each employee's "length of compensated service." Plaintiffs were permanently separated from defendant's employ pursuant to the contract, and, in computing their separation allowances, defendant credited them only with time actually spent in its employ for which they received wages.

This suit arises out of plaintiffs' claim that defendant should have included their years in the armed forces in calculating the separation allowances. Plaintiffs do not contend that the phrase "compensated service" was intended by defendant and the union to encompass military service. Rather, they argue that Section 8 of the Act requires that they be credited with their years in the armed forces, regardless of the intent of the parties to the agreement. Plaintiffs are correct in assuming that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). The problem presented by this case is that of whether the statute dictates that military service should have been included in "compensated service," irrespective of the intent of union and employer in choosing that language.

Section 8(b)(B) of the Act requires that a private employer restore a returning veteran "to [his for-

mer] position or to a position of like seniority, status, and pay * * *" Section 8(c) further provides:

> Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

If the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of "seniority, status, and pay," plaintiffs are entitled to be treated as if they had kept their position continuously during World War II. *Fishgold* v. *Sullivan Drydocks & Repair Corp., supra,* at 284–85. On the other hand, if the allowances constituted "insurance or other benefits," plaintiffs are not entitled to be credited with their years in the armed forces, for with certain immaterial exceptions, the agreement between defendant and the union did not treat time spent by employees "on furlough or leave of absence" as "compensated service."

There are no decisions in this circuit or in the Supreme Court determining whether separation allowances are included within the categories of "seniority, status, and pay" or of "insurance or other benefits." However, in *Borges* v. *Art Steel Co.,* 246 F. 2d 735, 738 (2 Cir. 1957), we drew the line between the two categories as follows:

> While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority."

In *Borges,* we ruled that "wage increases were in no sense fringe benefits, but became a regular part of the jobholder's pay or status, swelling his pay check every week he worked in the future * * *" *Id.* at 738–39. On the other hand, in *Siaskiewicz* v. *General Elec. Co.,* 166 F. 2d 463, 465–66 (2 Cir. 1948), we decided that "since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of 'other benefits.'" Accord, *Alvado* v. *General Motors Corp.,* 229 F. 2d 408, 410–11 (2. Cir. 1956), *cert. denied,* 351 U.S. 983; *Dwyer* v. *Crosby Co.,* 167 F. 2d 567 (2 Cir. 1948).

With some doubts, we hold that the separation allowances in the present case are properly "other benefits" rather than includable within "seniority, status, and pay." Unlike the wage increases in *Borges,* they did not become a regular part of plaintiffs' earnings, and, like the vacation rights in *Siaskiewicz,* they were neither pay for work actually done nor a traditional perquisite of seniority. On the contrary, they seemingly constituted only a miscellaneous benefit, devised *ad hoc* after intensive collective bargaining in order to serve a transitory purpose. We are confirmed in this conclusion by the decisions of two other Courts of Appeals. *Hire* v. *E. I. du Pont de Nemours & Co.,* 324 F. 2d 546, 549–50 (6 Cir. 1963); *Seattle Star, Inc.* v. *Randolph,* 168 F. 2d 274 (9 Cir.

1948). There are no appellate decisions to the contrary.

Reversed.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of January one thousand nine hundred and sixty-five.

Present: Hon. J. Edward Lumbard, Chief Judge; Hon. Thomas W. Swan; Hon. Sterry R. Waterman, Circuit Judges.

PASQUALE J. ACCARDI, JACOB GRUBESICK, ALFRED J. SEEVERS, ANTHONY J. VASSALLO, ABRAHAM S. HOFFMAN, FRANK D. PRYOR, PLAINTIFFS-APPELLEES

v.

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

A. DANIEL FUSARO, *Clerk.*

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 280

PASQUALE J. ACCARDI, ET AL.,
Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD F. BUTLER,
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IN THE

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No. 280

PASQUALE J. ACCARDI, *et al.*,

Petitioners,

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Question Presented

A 1960 agreement settling a labor dispute abolished certain jobs and provided for the payment of separation allowances graduated in accordance with the length of the compensated service of the employees affected. Since petitioners performed no compensated service for the respondent while in military service during World War II, this period was excluded in computing their allowances.

The question presented is whether Section 8 of the Selective Training and Service Act of 1940 overrides the labor agreement and compels respondent to compute petitioners'

separation allowances as though they had in fact rendered respondent compensated service during the time they were actually in military service.

The Statute

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 Ed.) § 308, provides in pertinent part as follows:

> "(a) Any person inducted into the land or naval forces under this Act * * * for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * *
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * *
>
> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B)

of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

In 1948 the Act was amended and Section 8 was renumbered 9. Section 9 is identical with its predecessor except that an additional subdivision 9(c)(2) was added providing:

"It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

This Court has expressed the view that Section 9(c)(2) is merely declaratory of the effect of Section 8 as interpreted by this Court in *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275 (1946). See *McKinney* v. *Missouri-Kansas-Texas R. R. Co.*, 357 U. S. 265, 271 (1958); *Tilton* v. *Missouri-Pacific R. R. Co.*, 376 U. S. 169, 175 (1964).

Statement

Petitioners are World War II veterans who were working for the respondent railroad as "oilers" on tugboats

in New York harbor when they were inducted into military service in 1941 and 1942 (4a, 5a).* Upon completion of this service they resumed working for the railroad and were restored to their former positions with the same seniority date they formerly had (*ibid.*)

Thereafter, a substantial part of the railroad tugboat fleet in New York harbor was converted from steam to diesel power and the railroads serving the harbor, including respondent, took steps to eliminate the oilers from the diesel tugs. This led to a strike in 1959 in connection with which the intervention of the courts was invoked (5a). (*Baltimore & Ohio R. R. Co., etc.* v. *United Railroad Workers,* 176 F. Supp. 53 (S.D.N.Y.), *reversed* 271 F. 2d 87 (2 Cir.), *vacated and remanded* 364 U. S. 278). The dispute was finally settled in 1960 by an agreement between the labor unions and affected railroads. This agreement abolished the position of oiler on the diesel tugs and established a scale of separation allowances graduated in accordance with length of compensated service: oilers with less than twenty years seniority were discharged and received the separation allowance appropriate to their length of compensated service; oilers with twenty or more years seniority had the option to terminate their employment with the maximum allowance, or to remain as employees of the railroad as oilers or engineers.

Thus, the agreement used "seniority" to measure the right of an employee to retain his job and "length of compensated service" to measure the amount of his separation allowance. It was recognized that "seniority" included periods of military service whereas "length of compensated service" did not. Similarly, the time during which employees were furloughed for non-military reasons (layoffs, leaves of absence, full time union employment, phys-

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* References are to Appellant's Appendix in the United States Court of Appeals for the Second Circuit.

ical disability, etc.) diminished "length of compensated service" but not "seniority".

All of the petitioners received a separation allowance the amount of which would have been greater had it been measured by seniority rather than length of compensated service. They brought the instant suit to recover the difference, asserting that the respondent was constrained by the Selective Training and Service Act of 1940 to pay them separation allowances graduated only in accordance with seniority.

The United States District Court for the Southern District of New York granted judgment for petitioners on the cross-motions of both parties for summary judgment (229 F. Supp. 193, quoted 19a-24a). The United States Court of Appeals for the Second Circuit reversed unanimously, 341 F. 2d 72 (quoted in Pet. for Cert. App. pp. 17-22).

Reasons for Denying Writ

There is no conflict between the decision below and the decisions of this Court or of the court of appeals of any other circuit, nor is review otherwise warranted.

While this Court has never had occasion to consider this precise question, its decisions interpreting and applying the veteran reemployment statutes are entirely consistent with the holding below that the employer and the union were free to negotiate a labor agreement granting benefits to all employees including veterans scaled in accordance with the individual employee's "length of compensated service".

Decisions of this Court have established that where employment advantages such as seniority or promotions accrue solely as the result of the passage of time the veteran's time in military service must be counted. *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275 (1946). Other decisions, however, have recognized that where the

labor agreement specifies that benefits depend upon prerequisites other than the passage of time, the veteran must meet these prerequisites. *McKinney* v. *Missouri-Kansas-Texas R.R. Co.*, 357 U. S. 265 (1958); *Tilton* v. *Missouri-Pacific R.R. Co.*, 376 U. S. 169 (1964). In *Tilton*, the most recent decision of this Court in this area, it was said (376 U. S. 169, 181):

> "This does not mean that under §§ 9(c)(1) and 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service."

In the case at bar, the labor agreement makes the quantum of the separation allowance dependent upon something other than the mere passage of time. The standard negotiated was "length of compensated service". The objective presumably was to absorb the shock of job loss and to tide the employees over the period of readjustment. Other standards might with equal logic have been chosen, such as seniority, past compensation, the employee's age (as a presumed function of his difficulty in finding reemployment), the number of his dependents, a flat training allowance, etc. The parties here chose "length of compensated service". While they might have chosen "seniority" they did not. The flaw in petitioners' position is their unjustified insistence that "length of compensated service" is equivalent to "seniority", whereas it manifestly is not. The former is a more precise measure of the total service rendered to the employer. It excludes alike furloughs for military service and furloughs for non-military reasons such as layoffs, leaves of absence, physical disability, serv-

ice in the union, and the like. It does not, therefore, discriminate against veterans. As such it was clearly permissible. *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521 (1949). In any event, there is no teaching in this Court which either directly or by the logic of its reasoning purports to preempt the right of the parties to choose "length of compensated service" to scale separation allowances.

The courts of appeals of several circuits have had occasion to consider whether time in military service must be counted where the labor agreement requires work on the job as a condition for qualification for benefits. The question has most frequently arisen with respect to vacations. Most labor agreements make eligibility for or the amount of vacation pay dependent upon the number of days actually worked or the amount earned during a previous period. The courts of appeals have consistently held that a veteran's absence during the qualifying period or his failure to satisfy requirements of actual work deprives him of such benefits.

Alvado v. *General Motors Corp.,* 229 F. 2d 408 (2 Cir. 1956);
Foster v. *General Motors Corp.,* 191 F. 2d 907 (7 Cir. 1951);
Brown v. *Watt Car & Wheel Co.,* 182 F. 2d 570 (6 Cir. 1950);
Dougherty v. *General Motors Corp.,* 176 F. 2d 561 (3 Cir. 1949);
Dwyer v. *Crosby Co.,* 167 F. 2d 567 (2 Cir. 1948);
Siaskiewicz v. *General Electric Co.,* 166 F. 2d 463 (2 Cir. 1948).

Only two other courts of appeals have considered this question in the context of separation or layoff allowances:

Seattle Star, Inc. v. *Randolph,* 168 F. 2d 274 (9 Cir. 1948);
Hire v. *E. I. duPont deNemours & Co.,* 324 F. 2d 546 (6 Cir. 1963).

The court below regarded both of these earlier decisions as sustaining its view and noted no contrary appellate decision. 341 F. 2d 72, 75 (Pet. for Cert. p. 22).

Petitioners admit (Pet. for Cert. p. 14) that the *Seattle Star* case is consistent with the decision below. They claim, however, that the *Hire* case is opposed and urge this Court to review because of the asserted conflict (Pet. for Cert. p. 12). Petitioners have misread the *Hire* case.

In *Hire*, the collective agreement provided what it termed "severance pay" every time an employee was laid off for lack of work. While a veteran was in service, employees of equivalent seniority were on two occasions laid off and paid severance pay. When the veteran returned, the second layoff was still in effect and he was placed on a recall list in accordance with his seniority. His employer refused to give him severance pay for either of the two layoffs. The court held that he was not entitled to pay for the first layoff because he was not then working. However, he was held entitled to pay for the second layoff because all the labor agreement required to qualify for severance pay was layoff for lack of work. The point decided was that the veteran who had been on the job when drafted and placed on laid-off status upon his return had been in effect laid off once and therefore qualified for severance pay under the agreement. Accordingly, there is no conflict between courts of appeals of different circuits which requires resolution by this Court.

Petitioners attribute unwarranted importance to the question involved. They apprehend a rising tide of separation pay contracts sparked by the progress of automation. But automation is not a new phenomenon. Neither are contracts for separation pay. Both have been a familiar part of the industrial scene ever since at least World War II when the veteran reemployment statutes were first enacted. Yet in a space of over twenty years the question has arisen only three times in lower courts. It is less likely

to arise in the future because of the growing acceptance of the principle of attrition as a solution for the problems of surplus manpower resulting from automation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

EDWARD F. BUTLER,
Attorney for Respondent.

R. L. DUFF,
Of Counsel.

August, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 280

PASQUALE J. ACCARDI, ET AL., PETITIONERS

v.

THE PENNSYLVANIA RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL MEMORANDUM

In its brief opposing the petition for a writ of certiorari, respondent does not rely upon the sole ground put forward by the Second Circuit as the basis for its decision—that a separation allowance paid to an employee when his job is abolished is only a "fringe benefit" and not either "pay" or some other benefit of seniority which Congress vouchsafed to a re-employed veteran under Section 8 of the Selective Training and Service Act of 1940. 54 Stat. 885, 890. Respondent contends that, although the separation allowances in question were measured and accorded in direct proportion to an employee's "length of compen-

sated service," these payments were "dependent on something other than the mere passage of time," and for this reason did not flow from seniority (Br. p. 6).

We note that the Second Circuit itself has rejected this argument. *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 739. See also, *Moe* v. *Eastern Air Lines*, 246 F. 2d 215, 220 (C.A. 5); and *Spearmon* v. *Thompson*, 167 F. 2d 626 (C.A. 8). Moreover, respondent's contention that "length of compensated service" should not be treated as a form of seniority because the former provides a precise measure of the actual service rendered to the employer (Br., p. 6) ignores the realities of the agreement between respondent and the union. Under the agreement, the separation allowance is determined by crediting a full month of compensated service time for any month in which an employee worked as little as one day (see Pet., p. 8).

For the reasons stated above and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 280

PASQUALE J. ACCARDI, ET AL., PETITIONERS

v.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (R. 25) is reported at 341 F. 2d 72. The opinion of the district court (R. 19) is reported at 229 F. Supp. 193.

JURISDICTION

The judgment of the court of appeals (R. 30) was entered on January 25, 1965. On April 27, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 21, 1965 (R. 31). The petition was filed on June 21, 1965, and granted on October 11, 1965 (R. 32). This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Employees whose jobs with the respondent railroad were abolished in 1960 were paid separation allowances based upon the number of months in which they had worked at least one day for the railroad. The question presented is whether those employees whose employment was interrupted by military service are entitled to allowances equal to what they would have received had they been continuously employed by the railroad during their absence in the service.

STATUTES INVOLVED

1. Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) 308, provides in pertinent part:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service * * *.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such a person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

2. The provisions of Section 9(c)(1) of the Selective Service Act of 1948, 62 Stat. 615 (renamed the "Universal Military Training and Service Act" by the Act of June 19, 1951, 65 Stat. 75), 50 U.S.C. App. 459, are identical with those of Section 8(c) of the Selective Training and Service Act, but Section 9(c)(2) of the 1948 Act further provides:

It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should

be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

The facts. The facts are stipulated. Petitioners Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Vassallo, Abraham S. Hoffman and Frank D. Pryor entered the employ of the respondent Pennsylvania Railroad Company in 1941 and 1942, when they signed on as "oilers" or "firemen" on the steam-operated tugboats then maintained by the railroad in New York Harbor (R. 4–5). Each petitioner's railroad employment was interrupted by military service during World War II. After approximately three years of wartime service, petitioners were honorably discharged from the armed forces and restored to their former positions with the railroad (R. 5).

Subsequently, respondent replaced almost all of its steam tugboats with diesel vessels, and, in 1959, along with the other railroads operating tugboats in the Port of New York, "abolished" the position of "fireman-oiler" on diesel tugs, precipitating a serious strike.[1] The dispute was finally settled on December 2,

[1] While the steam tugboats had required the services of two men in the engine room (an engineer and a fireman), the railroads contended that the diesel vessels required only an engineer. The background of this dispute—part of the so-called "featherbedding" controversy in the railroad industry—is more

1960, by a collective bargaining agreement between various railroad companies (including respondent) and the unions representing unlicensed engine-room personnel (including petitioners) (R. 5–6).

The agreement of December 2, 1960 (R. 9), eliminated the position of "fireman-oiler" on diesel-powered tugboats operated by the railroad in New York Harbor as of December 31, 1960, subject to certain conditions.[2] An employee with more than twenty years' seniority as an oiler as of December 1, 1960, was given the option of remaining in the railroad's employ or accepting a discharge together with severance pay (termed "separation allowance" in the agreement). Oilers with less than twenty years' seniority were simply dismissed with separation allowances. The amount of the separation allowance paid each discharged employee was based upon his "length of compensated service" with the railroad (R. 10), defined as follows (R. 10):

> A month of compensated service is any month in which the employee worked one or more days; a year of compensated service is 12 such months or major portion thereof.

On December 1, 1960, each petitioner lacked (by a matter of months) twenty years' seniority with the

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fully described in *Baltimore & Ohio R. Co.* v. *United Railroad Wkrs.*, 176 F. Supp. 53 (S.D. N.Y.), affirmed in part and reversed in part, 271 F. 2d 87 (C.A. 2), vacated and remanded, 364 U.S. 278.

[2] No prior collective bargaining agreement involving these employees had made provision for the abolition of an entire class of employees (R. 16–17).

railroad (R. 7). Accordingly, as provided in the agreement (R. 10), on December 31, 1960, all six were dismissed from their jobs with separation allowances (R. 6). In computing petitioners' separation allowances, respondent did not credit the years they had spent in military service.[3] Petitioners contended that the Selective Training and Service Act of 1940 entitled them, as re-employed veterans, to be treated as having rendered compensated service throughout their time in the armed forces for purposes of computing the separation allowances due them. It is stipulated that, if so treated, each was entitled to $1,242.60 more than respondent paid them. When respondent declined to adjust their allowances, the United States Attorney instituted this action in the district court on the veterans' behalf.[4]

The proceedings below. Both sides moved for summary judgment on the basis of the stipulated facts (R. 1). On April 28, 1964, the district court rendered a decision in favor of the petitioners. 229 F. Supp. 193 (R. 19). The court reasoned that: (1) Section 8(b)(B) of the Act required veterans to be restored to their former civilian employment in positions of "seniority, status, and pay" comparable to those which they would have achieved had they been continuously employed; (2) payment of a "separation allowance" came within the concept of seniority, status, and pay;

[3] The collective bargaining agreement makes no reference to veterans' rights.

[4] The Department of Justice represents these veterans pursuant to Section 8(e) of the Act, 54 Stat. 885, 891, 50 U.S.C. App. (1946 ed.) 308(e).

and (3) had petitioners been continuously employed by the railroad during their military-service time, they would have been entitled to receive separation allowances in the amounts they claimed.

"With some doubts," the court of appeals reversed. 341 F. 2d 72 (R. 25). It recognized that "[i]f the separation allowances granted to plaintiffs in 1960 come within the statutory concepts of 'seniority, status, and pay,' plaintiffs are entitled to be treated as if they had kept their positions continuously during World War II." But the court concluded that these allowances were subject, rather, to the "other benefits" clause of Section 8(c) of the Act, which provides that a veteran restored to his former position

> * * * shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *.

Since time spent on furlough or leave of absence was not included in determining an employee's separation allowance, the court reasoned that military-service time should also be excluded, and, on this ground, reversed the district court's judgment.[5]

[5] The district court had rejected respondent's additional defense that since the December 2, 1960, agreement had been entered into more than one year after plaintiffs' re-employment, the Act had no application. The court had ruled that the veteran's right under Section 8(c) not to be discharged without cause within one year after restoration to his former civilian employment was separate and distinct from his right to be restored without loss of seniority status, and pay. The court

ARGUMENT

Introduction and summary

When their jobs were abolished by the respondent railroad, petitioners received "separation allowances" (severance pay) in proportion to the number of months of "compensated service" that they had rendered. Compensated service was defined as those months in which an employee worked at least one day for respondent. Petitioners' employment with respondent was interrupted by a period of service in the armed forces. The ultimate question in this case is whether respondent's refusal to treat this period as compensated service for the purpose of computing the allowances to which petitioners were entitled violated Section 8(c) of the Selective Training and Service Act, which requires employers to restore returning veterans, like petitioners, to their former positions (or positions of "like seniority, status, and pay") "without loss of seniority." We submit that it did. If petitioners' military-service time is not included for this purpose, they will be denied benefits of seniority which Congress intended to preserve for them.

The term "seniority" as used in the statute refers to those benefits or perquisites granted employees au-

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had noted that if the year time limit against discharge without cause were read as a limitation on the other benefits of the Act, after the lapse of a year an employer and union could redraw an agreement so as to nullify the benefits conferred on veterans by the Act. The court of appeals found it unnecessary to pass on this issue. The district court's ruling was clearly correct (see pp. 12–13, *infra*).

tomatically upon the basis of continued employment. If, for example, employees of a particular class are automatically given a pay raise every three years, that raise is a benefit flowing from seniority. Seniority is "lost", within the meaning of the statute, when a re-employed veteran is denied a benefit he would have obtained by virtue of seniority but for the interruption of military service. For seniority purposes, the employer is required to treat the veteran as if he had remained continuously employed. Thus, in our earlier example, if the veteran worked for a year and then served in the armed forces for two, upon his return he would be entitled to the automatic pay raise, just as if he had remained continuously employed for three years.

Two issues are in dispute in this case. The first is whether the separation allowances granted petitioners constitute a benefit in fact flowing from seniority. We show, in the first part of our argument, that they do. These allowances were not intended as compensation for services actually rendered the employer. Nor were they—in contrast to, say, a promotion to executive rank—an exercise of managerial discretion. Viewed realistically, they were granted purely on the basis of length of employment with respondent—in other words, seniority. On this point, we do not understand the court below to be in disagreement with our position.

The second issue is whether the *kind* of seniority benefit represented by these separation allowances is, as the court below held, somehow excluded from the "without loss of seniority" clause of Section 8(c).

The court held that another clause of 8(c)—that which entitles the returning veteran to participate in such "insurance or other benefits" as are granted "employees on furlough or leave of absence"—establishes a critical distinction between "basic" benefits (*e.g.*, pay) and "fringe" benefits (*e.g.*, separation allowances). The court's view was that the returning veteran is entitled to the same basic benefits that he would have received if he had been continuously employed during the period of his military service, but only to those fringe benefits that he would have received had he been on furlough or leave of absence during that period. We show, in the second part of our argument, that the court's reading of the "other benefits" clause is contrary to the language, the legislative history, and the basic purposes of the statute. The correct reading, we submit, is that the returning veteran is entitled to all benefits flowing from seniority on the same basis as employees who remained continuously employed, and, *in addition,* to any benefits granted employees on leave of absence.

I

THE SEPARATION ALLOWANCES WERE BENEFITS FLOWING FROM LENGTH OF EMPLOYMENT; PETITIONERS, THEREFORE, WERE ENTITLED TO THE SAME ALLOWANCES THEY WOULD HAVE RECEIVED HAD THEIR EMPLOYMENT NOT BEEN INTERRUPTED BY MILITARY SERVICE

A. When Congress passed the nation's first peacetime draft act, it was justly concerned that "he who is called to the colors" not be "penalized on his return by reason of his absence from his civilian job." *Tilton* v.

Missouri Pacific R. Co., 376 U.S. 169, 170–171; *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 278. It therefore provided, in Section 8(c) of the Selective Training and Service Act of 1940,[6] that the returning veteran was entitled to be restored to his former civilian job "without loss of seniority." This Court, in a uniform course of decisions,[7] has construed this provision broadly, so as to effectuate the statute's benevolent purposes. The basic principle of these decisions was codified by Congress as Section 9(c)(2) of the 1948 Selective Service Act, which expresses "the sense of the Congress" that the returning veteran be "restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." This "continuous employment standard," as declared by Congress and the Court, has the following basic elements.

First. The veteran's seniority is deemed to accumulate while he is in the service, so that his seniority, upon re-employment, is the same as it would have been had he remained in his civilian job (*Fishgold*).

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[6] Now Section 9(c)(1) of the Universal Military Training and Service Act, 50 U.S.C. App. 459. The 1940 Act governs the rights of petitioners, who are veterans of World War II.

[7] *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169; *Brooks* v. *Missouri Pacific R. Co.*, 376 U.S. 182; *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265; *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960, reversing 211 F. 2d 95 (C.A. 3); *Oakley* v. *Louisville and Nashville R. Co.*, 338 U.S. 278; *Trailmobile Co.* v. *Whirls*, 331 U.S. 40; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275.

If, for example, the veteran had 10 years' seniority when he left to enter the armed forces, and was honorably discharged after three years, he is entitled, upon being restored to his former job, to claim 13 years' seniority.

Second. In computing such accumulated seniority, the employer is required to treat the returning veteran not only as if he had never interrupted his employment but as if he had actually remained on the job. The employer cannot treat the returning veteran as if he had been employed but absent on furlough or leave of absence (*Diehl*). The returning veteran acquires the same seniority, for the period during which he was in the service, as acquired by those employees who worked continuously during the same period—not merely the seniority acquired by those employees who were on leave or furlough.

Third. The re-employed veteran is entitled not merely to restoration of seniority in some abstract sense; he is entitled to the benefits or perquisites that seniority confers. Suppose, for example, employees are entitled to a transfer to a better job within the company after 15 years on the job. A veteran who was in the company's employ for 12 years before entering the military service, remained in the service for two years, and was re-employed upon his discharge would be entitled to the transfer after one more year of employment. It makes no difference when a benefit based on seniority arises;[8] the veteran's seniority, for purposes of determining whether

[8] As the facts of this case show, it may be many years after the veteran is re-employed.

he is entitled to the benefit, includes the period of his military service (*Oakley*).

Fourth. Seniority within the meaning of the statute means simply length of employment. A benefit or perquisite of seniority is one that is based upon length of employment—*i.e.*, it may be claimed automatically after completing a specified term of service—rather than upon other criteria. The veteran cannot, for example, claim back wages for the period during which he was in the service; payment of wages is not a perquisite of seniority but compensation for actual work. Nor would the returning veteran be entitled to a promotion that he might have received had he not been in the service, if the promotion was based upon management's judgment as to fitness for a more responsible job. Such a promotion is not based solely on length of service; it is not a right of seniority. In short, only where the qualification for a benefit or advancement is continued employment must the veteran be treated as if he had remained on the job during his period of military service (*McKinney*).[9]

[9] This distinction explains the result, if not always the rationale, of the cases dealing with restored veterans' vacation rights. Where the length of paid vacation is strictly dependent on years of service, the Act entitles a re-employed veteran to include his service time in determining his vacation rights. *Mentzel* v. *Diamond*, 167 F. 2d 299 (C.A. 3). But he may not include his service time where the applicable collective bargaining agreement treats length of vacation as a form of additional compensation for work actually done by the employee. See *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (C.A. 2); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C.A. 2); *Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (C.A. 2), certiorari denied, 351 U.S. 983.

We do not understand any of the foregoing general propositions to be in dispute in this case. What is in dispute is (1) whether certain benefits flowing from seniority are excepted from the requirements of the "without loss of seniority" clause by language elsewhere in Section 8(c)—a question we take up in Point II—and (2) whether the separation allowances involved in this case were actually granted on the basis of seniority rather than on some other basis—a question to which we now turn.

B. The separation allowances were computed, as provided in the collective bargaining agreement between respondent and petitioners' bargaining representative, on the basis of "compensated service." A month of compensated service was one in which the employee actually worked (as opposed to being absent, albeit employed) at least one day. Since a year of compensated service was defined as twelve such months or a "major portion thereof," it was possible for an employee who actually worked only seven days in the course of a year to receive a full year's allowance. The collective bargaining agreement distinguished between "compensated service" and "seniority." The latter was used to determine whether an employee was entitled to retain his job, and the record does not disclose how it was measured. However, it is clear that the nomenclature used in the collective bargaining agreement does not control petitioners' rights under the Act; "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress

has secured the veteran under the Act." *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 285. If the separation allowances were actually determined according to length of employment, the fact that the parties described the measure as "compensated service" rather than "seniority", and assigned the latter term to some other measure, could not alter petitioners' right to a benefit based upon seniority in the statutory sense of length of employment.[10]

We submit that length of employment was indeed the actual measure here. The separation allowances were not intended as compensation for services actually rendered by respondent's employees. Nor were they based upon the value, skill, training, diligence, or output of the employee, or granted or withheld as a matter of management discretion. Rather, they were granted as part of a comprehensive labor settlement, and it was their function to cushion the impact of

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[10] As the Second Circuit stated in *Borges* v. *Art Steel Co.*, 246 F. 2d 735, 739:

> * * * the meaning of the word "seniority" in the statute is not fixed by the local consensus of one union and one employer. "Seniority" as used in the Act covers benefits flowing from the length of tenure on the job * * *.

In that case, an employee's rate of pay was contingent upon his "consecutive working service." Such consecutive service—time actually on the job—was interrupted by a leave of absence, but "seniority" for other purposes continued to accrue while the employee was on such leave. The employer refused to credit a re-employed veteran's military service time toward his "consecutive working service." The court held that this refusal was improper under the Act. Accord: *Moe* v. *Eastern Air Lines*, 246 F. 2d 215 (C.A. 5); *Alfarone* v. *Fairchild Engine and Airplane Corp.*, 32 F.R.D. 19 (E.D. N.Y.); *Alfarone* v. *Fairchild Stratos Corp.*, 218 F. Supp. 446 (E.D. N.Y.).

the railroad's termination of jobs. Indeed, the allowances may properly be viewed as an exchange for the surrender by the employees of their job rights, based upon seniority.

That the allowances were in fact based upon length of employment is also shown by the method of their determination. They were not proportioned to the actual service rendered the company by the employee. An employee who worked for as little as 19 days spread evenly over two years, and was absent on leave the rest of the time, was entitled to twice the allowance of one who worked 250 days in one year. An employee who worked 200 days spread evenly over 10 years was entitled to a larger allowance than one who worked 2000 days during the same period but was on leave for one of the years. And the allowances were granted automatically on the basis of length of compensated service. No element of managerial discretion entered into determining who would receive them or in what amount.

Thus, to grant petitioners the increased separation allowances that they claim would not amount to paying the returning veteran for work not actually performed, or rewarding him for skills which he might have acquired (but did not) had he remained continuously employed. The increased allowances were a benefit that petitioners would have obtained automatically and without question had they remained in their civilian positions during the period of their military service. It is conceivable, of course, that sickness or some other fortuity might have prevented one

or more of petitioners from working at least one day a month during each of the years in which they were in service. But this could be true in any Section 8(c) case: had the restored veteran remained continuously employed rather than entering the military service, something might have happened—discharge for cause, extended illness, resignation—to deprive him of benefits based upon the length of his employment. This Court has made clear that Congress did not intend "possibilities of this sort to defeat the veteran's seniority rights." *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 180–181; *Brooks* v. *Missouri Pacific R. Co.*, 376 U.S. 182, 184–185.

II

THE RETURNING VETERAN IS ENTITLED TO ALL BENEFITS, WHATEVER THEIR NATURE, FLOWING FROM SENIORITY, AND TO SUCH ADDITIONAL BENEFITS, NOT BASED UPON SENIORITY, AS AN EMPLOYEE ON LEAVE OF ABSENCE WOULD BE ENTITLED TO

The court of appeals did not disagree with the point made in the preceding part of our argument—that the separation allowances in this case were benefits flowing from seniority. It based its *dubitante* (see p. 7, *supra*) rejection of petitioners' claim upon the clause in Section 8(c) of the Act that entitles the returning veteran to such "insurance or other benefits" as are granted "employees on furlough or leave of absence." In the court's view, this clause suggests that "miscellaneous fringe benefits" (including separation allowances) must be accorded the returning veteran only to the extent that they would

be accorded an employee who was on leave of absence. Since separation allowances were not granted those employees who by reason of leave of absence were unable to comply with the "compensated service" requirement, the court held that the petitioners were not entitled to include the period of their military service in computing the allowances due them. This construction of the "other benefits" clause is in direct conflict with the decision of the Sixth Circuit in *Hire* v. *E. I. du Pont de Nemours & Co.*, 324 F. 2d 546, 550 (also a severance pay case). We submit, moreover, that it is opposed to the language, the legislative history, and, most pointedly, the purposes of the Act.[11]

A. Section 8(c) confers upon the returning veteran a series of rights: to be restored without loss of seniority; to participate in insurance or other benefits available to employees on furlough or leave of absence; not to be discharged without cause within one year of restoration. These, we submit, are discrete and independent rights. The right to enjoy the benefits available to employees on leave is not expressed as a limitation upon the right to unimpaired seniority, and the latter right is stated in unqualified terms

[11] We recognize that, with regard to separation allowances, the Ninth Circuit seventeen years ago reached the same conclusion as the court below. *Seattle Star* v. *Randolph*, 168 F. 2d 274. But *Seattle Star* preceded, and its rationale in no way reflects, the controlling decisions of this Court which have been handed down in the intervening years. There is also language in some of the vacation cases supporting the court of appeals' approach in this case; but they, as we have indicated (see n. 9, *supra*, p. 13), are distinguishable.

without any suggestion that it is limited to certain kinds of benefits flowing from seniority. Where, as here, severance pay is determined on the basis of length of employment, and a returning veteran is denied the amount of such pay to which he would have been entitled but for the interruption of military service, obviously he has not been restored to the point on the seniority escalator that he would have reached had he remained continuously employed. The court's construction of 8(c) thus leads to the anomalous result that what one clause of the section grants—the right to unimpaired seniority—the next clause in large part retracts by carving out a broad and undefined exception for certain kinds of seniority benefits.

In adopting this strained construction, the court below ignored the obvious purpose which may be attributed to the "other benefits" clause: to confer benefits upon returning veterans beyond those based upon seniority.[12] Suppose that an employer establishes a group insurance plan in which all of his employees are eligible to participate, including those who are on leave of absence. The "without loss of seniority" provision, standing alone, would not entitle an em-

[12] The Act, as noted earlier (p. 13, *supra*), does not purport to restore returning veterans to their civilian positions with all of the advantages that they would have enjoyed had their employment not been interrupted by military service. To take a clear example, the veteran is not entitled to back pay for the period during which he was in the service, even though had he remained continuously employed he would, of course, have been paid for his work. He is entitled only to those benefits that accrue from length of employment. This is capsulized in the requirement that he be restored "without loss of seniority."

ployee inducted into the military service to continue to participate in the insurance plan while in the service, though it might entitle him to seek reinstatement in the plan upon his return. The "other benefits" clause was added for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence. The employer was required to treat an employee absent on military service no worse than he treated employees absent on furlough or leave of absence. The benefits thus conferred were separate from and in addition to the post-restoration benefits conferred by the "without loss of seniority" clause.[13]

B. The legislative history unequivocally supports our reading of the "other benefits" clause. In the bill originally reported out of the Senate Committee on Military Affairs (S. 4164, 76th Cong., 3d Sess.), Section 8(c) provided only for the veteran's rights on his return from military service. It stated (86 Cong. Rec. 10079):

> Any person who is restored to a position in accordance with paragraphs (A) or (B) of subsection (b) shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged without cause within 1 year after such restoration.

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[13] This is also indicated by the fact that the veteran is entitled only to such "insurance or other benefits" as were provided by the employer "at the time" that the veteran was inducted into the service. The idea is that the employer was not to discontinue those benefits enjoyed by the veteran before he left to join the armed forces, but to continue them if he would do the same for employees on furlough or leave of absence.

This language was amended on the floor of the Senate, without substantial debate and with the support of Senator Sheppard, Chairman of the Senate Committee which reported the bill, for the apparent purpose of adding a guarantee that any benefits accruing to employees absent on other forms of leave should also be enjoyed by the veteran while he was absent in military service (86 Cong. Rec. 10914). In the words of the amendment, the veteran was to "be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into [the military] forces." Senator Sheppard explained (*ibid.*):

> That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me to be a good suggestion.

Representative May, the Chairman of the House Committee on Military Affairs, introduced on behalf of his Committee an identical amendment to the version of the Selective Service bill then pending before the House of Representatives (86 Cong. Rec. 11366, H.R. 10132, 76th Cong., 3d Sess.). He explained (86 Cong. Rec. 11702):

> Mr. MILLER. In reference to insurance, will that apply to group insurance? Many industrial plants, of course, carry group insurance. Under those contracts they continue their participation while a man is on vacation or fur-

lough. Would they continue those policies in force?

Mr. MAY. This would continue them in force and that is the very purpose of the legislation.

The Senate bill was later substituted for the House bill (86 Cong. Rec. 11755), and enacted (86 Cong. Rec. 12185, 12228).

Thus, it was the understanding of the framers of the "other benefits" clause that it would create rights additional to those conferred in other parts of the legislation. The "without loss of seniority" provision protected the veteran's rights upon restoration. But Congress also desired to give him certain protections while he was in the service. That is why the "other benefits" language was added to Section 8(c).

C. Not only is the reading of the court of appeals contrary to the language and legislative history of the statute; it is inconsistent with the statute's basic purpose. Congress determined that the returning veteran should enjoy the same seniority rights as if he had never left private employment. This objective would suffer if employees were free, as the court below ruled, to withhold such seniority rights with respect to a wide range of benefits which, as the facts of this case graphically demonstrate, are often very substantial."

In addition, it is unrealistic to suggest that a meaningful distinction related to the purposes of the

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[14] Thus, petitioner Accardi was (if his military service is included) entitled to a separation allowance of $5,177.50 (R. 7)—roughly a full year's wages (see R. 10).

Act can be drawn between basic and fringe benefits. In an era when wages are generally high and income taxes steep, labor and management recognize that it is in the interest of employees to take a large part of their compensation in indirect forms. Unions bargain vigorously for a host of diverse benefits [9] besides wages and the "traditional" rights of seniority. To describe these extensive and valuable additional benefits as "fringe" items is a mere play on words; they are increasingly regarded as critical elements of employee remuneration. The exclusion of veterans from benefits which have come to be regarded as essential perquisites of employment would be plainly inconsistent with the statutory scheme.

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[9] Such as pensions and retirement plans (*Retail Clerks Union* v. *N.L.R.B.*, 330 F. 2d 210 (C.A.D.C.), certiorari denied, 379 U.S. 828; *Inland Steel Co.* v. *N.L.R.B.*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960); profit sharing (*N.L.R.B.* v. *Black-Clawson Co.*, 210 F. 2d 523 (C.A. 6); bonuses (*N.L.R.B.* v. *Citizens Hotel Company*, 326 F. 2d 501 (C.A. 5)); merit pay (*N.L.R.B.* v. *United Brass Works, Inc.*, 287 F. 2d 689 (C.A. 4)); company-furnished housing (*N.L.R.B.* v. *Bemis Bro. Bag Co.*, 206 F. 2d 33 (C.A. 5)); stock purchase plans, (*Richfield Oil Corporation* v. *N.L.R.B.*, 231 F. 2d 717 (C.A.D.C.)), certiorari denied, 351 U.S. 909); vacations (*N.L.R.B.* v. *Century Cement Mfg. Co.*, 208 F. 2d 84 (C.A. 2)); group health insurance (*W. W. Cross & Co.*, v. *N.L.R.B.*, 174 F. 2d 875 (C.A. 1)); and even discounts on gas used for house heating purposes (*N.L.R.B.* v. *Central Illinois Public Service Co.*, 324 F. 2d 916 (C.A. 7)). See, also, Forkosch, *Treatise on Labor Law* (2d ed. 1965), § 557, pp. 854–865; Ross, *Fringe Benefits Today and Tomorrow*, 7 Labor L. J. 476; Note, *Proper Subjects for Collective Bargaining*, 58 Yale L. J. 803.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PASQUALE J. ACCARDI, *et al.*,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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No. 280

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

Question Presented

A 1960 agreement settling a labor dispute abolished certain jobs. Employees with less than twenty years seniority were discharged with allowances scaled not in accordance with their seniority but in accordance with length of compensated service, as defined in the agreement, thereby excluding from consideration periods on furlough for any reason except employment incurred disability.

The question presented is whether Section 8 of the Selective Training and Service Act of 1940 overrides the

agreement and compels respondent to pay petitioners additional amounts on the theory that the period used to scale their allowances had to include the time they were furloughed for military service during World War II.

The Statute

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) § 308, provides in pertinent part as follows:

> "(a) Any person inducted into the land or naval forces under this Act * * * for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * *
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * *

> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

When the Selective Service Act of 1948,* 62 Stat. 615, was enacted, Section 9(c)(1) reenacted *in haec verba* the provisions of Section 8(c) of the 1940 Act. At the same time a new section was added which had no counterpart in the 1940 Act, Section 9(c)(2), which provides:

> "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Section 9(c)(2) was viewed by its proponents as an affirmation of the "escalator principle". Senate Report No. 1286 (at p. 16), Committee on Armed Services, 80th Congress, 2nd Session. This principle was first announced by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*,

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* The 1940 Act governs the rights of petitioners, as they acknowledge (Pet. brief, p. 11, footnote 6).

328 U. S. 275, 284-5 (1946). This view of Section 9(c)(2) has since been confirmed by this Court. *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265, 271 (1958); *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169, 175 (1964).

Statement

Petitioners are World War II veterans who were working for the respondent railroad as "oilers" on tugboats in New York harbor when they were inducted into military service in 1941 and 1942 (R4-5). Upon completion of this service they resumed working for the railroad in 1945 and 1946 and were restored to their former positions with the same seniority date they formerly had (*ibid.*).

Thereafter, most of the railroad tugboat fleet in New York harbor was converted from steam to diesel power and the railroads serving the harbor, including respondent, took steps to eliminate the oilers from the diesel tugs. This led to a strike in 1959 in connection with which the intervention of the courts was invoked (R5). (*Baltimore & Ohio R. Co., etc.* v. *United Railroad Workers*, 176 F. Supp. 53 (S.D.N.Y.), *reversed* 271 F. 2d 8. (2 Cir.), *vacated and remanded* 364 U. S. 278). The dispute was finally settled in 1960 by an agreement between Local 1463 of the Transport Workers' Union and the affected railroads. This agreement abolished the position of oiler on the diesel tugs and established (R9-13) a scale of separation allowances graduated in accordance with length of compensated service: oilers with less than twenty years seniority were discharged and received the separation allowance appropriate to their length of compensated service; oilers with twenty or more years seniority had the option to terminate their employment and take their allowance, or to remain as employees of the railroad.

Thus, the agreement used "seniority" to measure the right of an employee to retain his job and "length of

compensated service" to measure the amount of his separation allowance. It was recognized that "seniority" included periods of military service whereas "length of compensated service" did not (R5-6). Similarly, the time during which the employees were furloughed for non-military reasons (layoffs, leaves of absence, full time union employment, physical disability,* etc.) diminished "length of compensated service" but not "seniority".

Petitioner Accardi had twenty years seniority as defined in the agreement (R7, 14).** He elected nevertheless to resign and take the allowance. All the other petitioners had less than twenty years seniority and had no alternative. They all, including Accardi, received a separation allowance, the amount of which would have been greater had it been measured by seniority rather than length of compensated service (R6-7). They brought the instant suit to recover the difference, asserting that the respondent was constrained by the Selective Training and Service Act of 1940 to pay them separation allowances graduated only in accordance with seniority.

The United States District Court for the Southern District of New York granted judgment for petitioners on the cross-motions of both parties for summary judgment (229 F. Supp. 193; R19-24). The United States Court of Appeals for the Second Circuit reversed unanimously (341 F. 2d 72; R25-29).

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* Except for injuries sustained during the course of employment (R14).

** The statement in petitioners' brief (pp. 5-6) that all of them lacked twenty years seniority and were dismissed is inaccurate as respects petitioner Accardi.

Argument

The 1960 agreement was designed in good faith to settle the labor dispute which had flared up in 1959 as a result of the claim of the rail carriers in New York harbor that oilers were not needed on diesel tugs and that the carriers had the unilateral right to abolish the oilers' jobs (R5-6). These events occurred many years after petitioners had been restored to these jobs following completion of their World War II service. While they were in military service between 1942 and 1946, the collective bargaining agreement contained no provision for separation pay for any employee irrespective of his seniority or status. Indeed, the agreement in suit was the first which provided separation pay for any of respondent's employees (R16). Under it, oilers with less than twenty years seniority were discharged with a separation allowance proportioned to the length of their compensated service. Furloughs or leaves of absence taken at any time over the period of employment, whether for military or non-military (except employment incurred disability) reasons, diminished "length of compensated service" but not "seniority".* Thus, the agreement undertook to dispose of the claims of all employees in the disputed oiler classification by standards uniformly applicable to veterans and non-veterans alike. It contained no taint of hostility toward veterans (R17). *Cf. Aeronautical Industrial District Lodge* v. *Campbell,* 337 U. S. 521, 529; *Ford Motor Co.* v. *Huffman, et al.,* 345 U. S. 330, 336.

Petitioners claim that by virtue of Section 8(c) of the Selective Training and Service Act of 1940 the parties to the 1960 agreement were not free to measure the separation allowances by length of compensated service and

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* Petitioners' brief (p. 14) asserts that the record does not disclose how seniority was measured. The record does show, however, that seniority was measured from the date each petitioner was first employed by respondent to December 31, 1960 (R4, 5, 7, 11).

thereby exclude from the computation their periods of military service. Respondent submits that there is nothing in Section 8(c) or the judicial teaching construing it which supports this claim.

The Scope of Section 8(c)

Section 8(c) provides that a veteran restored in accordance with the requirements of the preceding subsection (to the job he left or one of "like seniority, status and pay") shall be (i) "considered as having been on furlough or leave of absence"; (ii) "restored without loss of seniority"; (iii) entitled to "insurance or other benefits" to which employees on furlough or leave of absence were entitled at the time of his induction into the service; and (iv) protected against discharge without cause for one year.

Petitioners base their claim on the requirement that the veteran be restored "without loss of seniority". This clause of Section 8(c) requires restoration of a returning veteran not only to the seniority he had at the time he left but to that he would have had on the seniority "escalator", had he remained on the job. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284-5. Furthermore, although he may be discharged without cause after the expiration of one year following his restoration, his seniority status continues as long as he remains on the job. *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278. Such rights, however, may be modified or divested on terms applicable without discrimination to veteran and non-veteran employees alike. *Trailmobile* v. *Whirls*, 331 U. S. 40; *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U. S. 521; *Ford Motor Co.* v. *Huffman, et al.*, 345 U. S. 330. No purpose to prefer veterans over non-veterans of equal seniority should be read into the statute. *Trailmobile* v. *Whirls, ibid.* at p. 59; *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463, 466 (2 Cir. 1948). While a veteran is entitled under the statute to job preferments which enure to

his seniority status, he is not entitled to those which depend on factors other than seniority. *McKinney* v. *Missouri-Kansa-Texas R. Co.*, 357 U. S. 265.

The first clause of Section 8(c) which treats the returning veteran as having been "on furlough or leave of absence" does not modify the second requiring his restoration "without loss of seniority" so that a veteran's time in service must be counted in fixing his seniority date. *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169; *Brooks* v. *Missouri Pacific R. Co.*, 376 U. S. 182. Save where the veteran's seniority date is in issue, however, the statute directs that during his period of military service he "shall be considered as having been on furlough or leave of absence". Indeed, this clause controlled one facet of the decisions in *Tilton* and *Brooks*. In those cases, promotions to journeyman status were automatic after a fixed period of apprentice service. Nevertheless, it was held that time in military service would not count towards this but that a returning veteran had to serve out the full period of apprenticeship on the job to earn promotion. Thus, for purposes of promotion he was treated as though he had been "on furlough or leave of absence". Only when promoted was he entitled to have his seniority backdated to reflect the time when he would have completed the apprenticeship service but for his military service and he is entitled to this only because when he was inducted into service "as a matter of foresight, it was reasonably certain that advancement would have occurred" (376 U. S. at p. 181).

No change in the scope of Section 8(c) was wrought by the adoption by Congress of the statement of policy which became Section 9(c)(2) of the Selective Service Act of 1948. The report of the Senate Committee on Armed Services (80th Congress, Report No. 1286) accompanying the bill stated with respect to veteran re-employment rights that (*ibid.* p. 15) "no important substantive changes have been made in the provisions of the 1940 Act". Section

9(c)(2) was specifically described as (*ibid.* p. 16) a "statement of policy regarding application of the 'escalator principle' ". This, of course, was the principle which had been announced by this Court in *Fishgold* (328 U. S. at p. 284). Some have thought* that there is an irreconcilable conflict between Section 9(c)(2), which requires that a veteran be restored with such status as he would have had "if he had continued in such employment", and 9(c)(1), (former 8(c)), which requires that the veteran "shall be considered as having been on furlough or leave of absence". The conflict is illusory. The opinion in *Fishgold* had expressly pointed out that a furloughed employee "has a continuing relationship with the employer" and that such temporary suspension of his work "commonly does not affect the continuance of his status" (328 U. S. at p. 287). And in *Aeronautical Lodge*, this Court recognized that the veteran was given "the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force" (337 U. S. at p. 526).

Accordingly, whether or not it is read in the light of the congressional declaration of policy, Section 8(c) does not require that a veteran be treated for all purposes as though he had continued to work on the job while he was in military service. As the Court said in *Tilton* (376 U. S. at p. 181):

> "This does not mean that under §§ 9(c)(1) and 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job."

Section 8(c) does not support petitioners' claim.

The provisions for separation allowances in this case in no way trespassed upon petitioners' rights under Sec-

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* E.g.: *Diehl* v. *Lehigh Valley R. Co., et al.*, 211 F. 2d 95, 99 (3 Cir. 1954), *rev'd* 348 U. S. 960.

tion 8(c). The parties did not choose to scale these allowances in proportion to seniority and there is nothing in the statute which can fairly be read as mandating any such choice. The statute does not purport to create a seniority system but accepts that established by the process of collective bargaining. *Aeronautical Industrial District Lodge* v. *Campbell, supra,* 337 U. S. at pages 526-27; *McKinney* v. *Missouri-Kansas-Texas R. Co., supra,* 357 U. S. at page 268; *Brown* v. *Watt Car & Wheel Co.,* 182 F. 2d 570, 572 (6 Cir. 1950). Nor does it undertake to dictate the benefits which shall accrue to seniority. The perquisites of seniority are fixed not by Section 8(c) but by the collective bargaining process.*

Sound principles of public policy require that they continue to be fixed by the collective bargaining process. The circumstances in the case at bar exemplify this. The rail carriers in New York harbor and Local 1463 of the Transport Workers Union were faced with an industrial crisis. The union wanted the oilers jobs continued. The railroads wanted them abolished. The separation allowances were the price the railroads had to pay to gain their objective. These allowances were in effect a lump sum settlement for the surrender by the oilers of further efforts to protect their jobs. The parties might have chosen a variety of logically defensible scales by which to measure the individual amounts. The objective presumably was to absorb the shock of job loss and to tide the employees over the period of readjustment. Thus the parties might have chosen to measure the separation allowances by the employee's age (as a presumed function of his difficulty in finding reemployment), the number of his dependents, a flat retraining allowance, total previous

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* Some job advantages such as work preference and order of layoff and recall are usually associated with seniority. *Tilton* (376 U. S. at p. 173). But even in these areas the precise role played by seniority is frequently subordinated to other qualifications. See *Bureau of National Affairs, Inc. Collective Bargaining Service,* Sections 60, 75.

earnings on the job, seniority, etc.* Any scale chosen had to be satisfactory not only to the union but also to each of the seven railroads involved which meant that as applied to each of them the cost could not exceed what each was willing to pay to achieve its objective. The parties chose "length of compensated service". Had they anticipated exposure to additional cost by claims such as are here asserted some other scale might have been negotiated or, perhaps, the achievement of industrial peace might, in this instance, have been imperiled altogether. The method of defining "length of compensated service" adopted by the contract clearly reflects the give and take of the bargaining process. It is an obvious compromise between an actual count of time on the job and a token sampling of such time. A sound national labor relations policy demands that the parties be free to negotiate such compromise. Congress has committed the nation to a labor relations policy which leaves the parties free "to make such concessions and accept such advantages as in the light of all relevant considerations, they believe will best serve the interests of the parties." *Ford Motor Co.* v. *Huffman, et al.*, 345 U. S. 330, 338.

We submit, therefore, that the decisive consideration here is that the agreement provided benefits to be awarded to individual employees on a basis other than seniority and that it was reached in good faith without in any way discriminating against either veterans or non-veterans (R 5, 17). The time of all oilers on furlough or leave of absence (except for employment incurred physical disability) was omitted in the calculation. The agreement complied not only with the spirit but also with the letter of Section 8(c), the first clause of which directs that a veteran "shall be considered as having been on furlough or leave of absence".

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* Severance Pay and Layoff Benefit Plans, U. S. Dept. of Labor Bulletin No. 1425-2, Chapter IV. Note that typical plans gear eligibility to service on the job. *Ibid* p. 30.

The significance of the "insurance or other benefits" clause of Section 8(c).

The Court of Appeals in arriving at the decision below reasoned that the separation allowances in suit are not a perquisite of "seniority" but are more akin to "other benefits" with respect to which veterans by virtue of the third clause of Section 8(c) are to be treated as furloughed employees. That clause provides that a veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into the armed forces". Manifestly, that clause has no direct application here because no one was entitled to separation allowances of any kind at the time these petitioners were inducted into the armed forces. The clause does, however, have *a fortiori* persuasiveness because if a veteran is to be treated as a furloughed employee with respect to "other benefits" in existence at the time of his military service, he is certainly entitled to no higher priority of treatment with respect to "other benefits" initiated after his return.

In reaching its decision, the Court below relied on a series of prior decisions holding that "other benefits" include separation pay [*Seattle Star, Inc.* v. *Randolph*, 16 F. 2d 274 (9 Cir. 1948); *Hire* v. *E. I. duPont deNemours & Co.*, 324 F. 2d 546 (6 Cir. 1936)*] and vacation pay [*Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (2 Cir. 1956); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2 Cir. 1948); *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (2 Cir.

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* Petitioners cite the *Hire* case as in conflict with the decision below (Pet. Brief, p. 18). It is not. Two increments of severance (layoff) pay were involved. The veteran was held not entitled to the first because he was not on the job when it occurred. He was held entitled to the second because he qualified for it under the agreement.

1948)]. Other decisions in accord on vacation pay are *Foster* v. *General Motors Corp.*, 191 F. 2d 907 (7 Cir. 1951); *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (6 Cir. 1950); *Dougherty* v. *General Motors Corp.*, 176 F. 2d 561 (3 Cir. 1949).

Petitioners now claim that all of these decisions have uniformly misconstrued the "other benefits" clause. Their argument is that this clause does not apply to veterans after they have been restored to their civilian jobs but only while they are in military service. They assert (Pet. Brief, p. 20):

> "The 'other benefits' clause was added for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence",

and further (*ibid.*, p. 22):

> "The 'without loss of seniority' provision protected the veteran's rights upon restoration. But Congress also desired to give him certain protections while he was in the service. That is why the 'other benefits' language was added to Section 8(c)."

This interpretation simply cannot be reconciled with the plain language of the statute. The Act does not purport to give veterans any rights against their employers while they are in a military service. Section 8(c) by its express terms is applicable only to "any person who is restored to a position". Accordingly, the application of the "other benefits" clause to restored veterans cannot be read out of the law as petitioners seek to do. There remains the clear and valid distinction between "other benefits" and benefits associated with the "without loss of seniority" clause which was the foundation stone for the decision below.

CONCLUSION

For the reasons stated, the judgment in the Court of Appeals should be affirmed.

Respectfully submitted,

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December 1965.

SUPREME COURT OF THE UNITED STATES

No. 280.—October Term, 1965.

Pasquale J. Accardi et al., Petitioners, *v.* The Pennsylvania Railroad Company.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 28, 1966.]

Mr. Justice Black delivered the opinion of the Court.

Petitioners, who are World War II veterans and former employees of the Pennsylvania Railroad, brought this action claiming that their former employer denied them certain seniority rights guaranteed by § 8 of the Selective Training and Service Act of 1940.[1] Section 8 (b)(B) of that Act provides that upon application by any former employee who has satisfactorily completed his military service, a private employer "shall restore" such honorably discharged serviceman to his former "position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Section 8 (c) re-emphasizes § 8 (b)(B) by providing that any person so restored "shall be so restored without loss of seniority."

The facts in this case are undisputed. In 1941 and 1942 the six petitioners began working as firemen on tugboats owned by the Pennsylvania Railroad and operated in the Port of New York. Petitioners left their jobs in 1942 and 1943 to enter the armed services and after serving three years or more each received an honor-

[1] 54 Stat. 890, as amended, 50 U. S. C. App. § 308 (1964 ed.). Section 8 of the 1940 Act is now § 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U. S. C. App. § 459 (1964 ed.).

able discharge. Shortly after discharge each was restored by the railroad to his former position as fireman with the same amount of seniority he had before leaving plus credit for the time spent in the armed forces, as required by the 1940 Act. All six continued to work for the railroad until 1960. In 1959 a labor dispute broke out when the Pennsylvania and nine other railroad carriers operating tugboats claimed that firemen were not necessary on the new diesel tugs, and the owners of the tugs sought to abolish the craft and class of fireman. The unions affected called a strike. This strike was settled in 1960 when petitioners' union and the railroads entered an agreement which abolished the position of fireman on all diesel tugs. As their part of the bargain the railroads agreed to retain in their employ firemen with 20 years or more seniority who desired to remain, but all firemen with less than 20 years seniority were discharged. To make this settlement more acceptable to the employees, those who were discharged or who did not desire to stay with the railroads were paid a severance or separation allowance based on a formula set out in the agreement. Each of the petitioners involved in this case left his job with the Pennsylvania Railroad and received a separation allowance, but each received less than he thought was due. This lawsuit was begun as an attempt to recover what each believed was owed him by the railroad.

The amount of the separation allowances was determined, according to the language of the agreement, by the length of "compensated service" with the railroad. A month of "compensated service" was defined as any month in which the employee worked one or more days and "a year of compensated service is 12 such months or major portion thereof." In computing petitioners' separation allowances the railroad did not include the years spent in the armed forces as years of "compensated service." Petitioners claim this was error and contrary

to § 8 of the Selective Training and Service Act of 1940. Each petitioner received $1,242.60 less than he would have if given credit for the three or more years he spent in military service and the parties have stipulated that if petitioners are entitled to have the time in the service included in determining severance pay, judgment for this amount should be rendered for each of them. The District Court rendered judgment for petitioners. The Court of Appeals reversed, holding, contrary to the District Court, that the petitioners were not entitled to credit for their time in the service in computing the allowances because the allowances did not come within the concepts of "seniority, status, and pay." 341 F. 2d 72.

The language of the 1940 Act clearly manifests a purpose and desire on the part of Congress to provide as nearly as possible that persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country. Section 8 (b)(B) of the statute requires that private employers reinstate their former employees who are honorably discharged veterans "to [their former] position or to a position of like seniority, status, and pay," and § 8 (c) provides that such a person "shall be so restored without loss of seniority." This means that for the purpose of determining seniority the returning veteran was to be treated as though he had been continuously employed during the period spent in the armed forces. *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 284–285. The continuing purpose of Congress in this matter was again shown in the Selective Service Act of 1948, 62 Stat. 604, as amended, 50 U. S. C. App. § 451 *et seq.* (1964 ed.). Section 9 (c)(2) of that Act provides:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accord-

> ance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Respondent railroad does not quarrel with this interpretation of the statute but insists that the severance pay involved here was not based on seniority and that §§ 8 (b)(B) and (c) are wholly inapplicable to this case.

The term "seniority" is nowhere defined in the Act, but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the Act. As we said in *Fishgold* v. *Sullivan Corp., supra,* "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veterans under the Act." At p. 285. The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad. The railroad contends, however, that the allowances were not based on seniority, but on the actual total service rendered by the employee. This is hardly consistent with the bizarre results possible under the definition of "compensated service." As the Govern-

ment [2] points out, it is possible under the agreement for an employee to receive credit for a whole year of "compensated service" by working a mere seven days. There would be no distinction whatever between the man who worked one day a month for seven months and the man who worked 365 days in a year. The use of the label "compensated service" cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority. The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. We hold that the failure to credit petitioners' "compensated service" time with the period spent in the armed services fails to accord petitioners the right to be reinstated "without loss of seniority" guaranteed by §§ 8 (b)(B) and (c).

What we have said makes it unnecessary to discuss in detail the Court of Appeals' holding that these allowances did not come within the concepts of "seniority, status, and pay" and thus were governed not by § 8 (b)(B) and the part of § 8 (c) relating to seniority but rather by the

[2] The Department of Justice is representing petitioners in this case pursuant to § 8 (e) of the 1940 Act.

clause in § 8 (c) stating that returning veterans "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces. . . ." The Government contends that the "other benefits" clause of § 8 (c) was added to the bill "for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence." The legislative history referred to in the Government's brief persuasively supports such a purpose.[3]

This argument of the Government—that the "insurance or other benefits" clause was put in to provide these company benefits for the serviceman at the time he was in the armed forces—also finds some support from the fact that § 8 (c) provides that the serviceman would be entitled to these benefits only if they were "in effect with the employer at the time such person was inducted into such forces . . . ." Without attempting in this case to

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[3] Senator Shepherd in explaining an amendment which included the "other benefits" provision said:

"That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me to be a good suggestion." 86 Cong. Rec. 10914.

And Congressman May, the Chairman of the House Committee on Military Affairs, had this colloquy with another Congressman on the same question:

"Mr. MILLER. In reference to insurance, will that apply to group insurance? Many industrial plants, of course, carry group insurance. Under those contracts they continue their participation while a man is on vacation or on furlough. Would they continue those policies in force?

"Mr. MAY. This would continue them in force and that is the very purpose of the legislation." 86 Cong. Rec. 11702.

determine the exact scope of this provision of § 8 (c) it is enough to say that we consider that it was intended to add certain protections to the veteran and not to take away those which are granted him by § 8 (b)(B) and the other clauses of § 8 (c).

Since the Court of Appeals held that the provisions of § 8 (b)(B) did not apply to separation allowances it found it unnecessary to decide an alternative ground which the railroad contended should cause reversal. That contention was that since the agreement between the railroad and the union was entered into more than one year after petitioners were restored to their employment, the Act has no application to any rights created by the agreement. This argument rested on that part of § 8 (c) which provides that a veteran who is restored to employment "shall not be discharged from such position without cause within one year after such restoration." The District Court rejected the contention as having no merit. We agree with the District Court and believe this contention to be so wholly without merit that it need not be remanded to the Court of Appeals for its decision on the point. In *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 284, we said:

> "[T]he expiration of the year did not terminate the veteran's right to seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment; nor did it open the door to discrimination against him as a veteran . . . . His seniority status . . . continues beyond the first year of reemployment. . . ."

What we said there governs this case. The District Court was correct in rejecting this contention of the railroad.

In the Court of Appeals the railroad also contended that the District Court had improperly computed the

interest owing on the judgment awarded the plaintiffs. Because of its holding that petitioners were entitled to no recovery at all the Court of Appeals declined to decide the question of interest. The record before us does not present that question with sufficient clarity for us to pass upon it.

We affirm the judgment of the District Court holding that petitioners are entitled to recover from the railroad the stipulated damages due them because they are entitled to credit for the full amount of time served in the armed forces in calculating their severance pay. But the cause is remanded to the Court of Appeals for further consideration of the interest contention.

Reversed and remanded.

THE CHIEF JUSTICE took no part in the decision of this case.